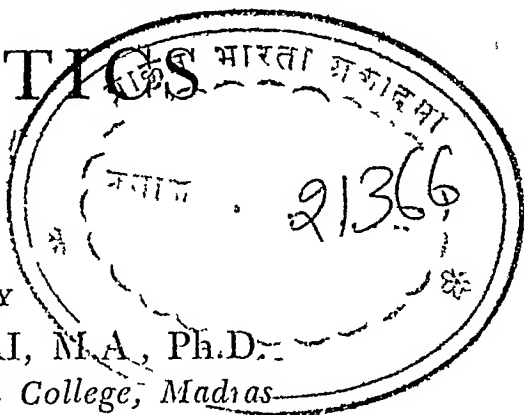




# THE SUBSTANCE OF POLITICS

BY

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## PREFACE

This book is an attempt to state briefly and simply the essential principles of political theory and organization. It has been written primarily to meet the needs of the undergraduate.

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Part One

**POLITICAL THEORY**





## CHAPTER I

# FUNDAMENTAL IDEAS

### §1 WHAT IS POLITICS?

When we observe the life of men around us, we cannot fail to be struck by two facts—as a rule, every man desires to have his own way, to think and act as he likes, and at the same time, everyone cannot have his own way, because he lives in society. One man's desires conflict with those of another. The relations of the individual members of society with one another, therefore, need regulation by government. When a body of people are clearly organized as a unit for purposes of government, then they are said to be *politically*<sup>1</sup> organized and may be called a body politic or State—a society politically organized. The essence of such a society is that a group of people called the Government are clothed with authority to make laws and enforce them, they claim obedience from the members of the society whom they govern.

Politics, then, deals with the State or political society, meaning by the term a people organized for law within a definite territory. The subject has two main subdivisions—(i) Political theory and (ii) Political organization.

Political theory, in the words of E. Barker, is primarily concerned with the purpose or purposes which man proposes to himself as a moral being, living in association with other moral beings. It asks—What are the purposes of political organization and what are the best means of realizing them? The individual wants to realize his best self, to what extent can the State help him in this, his natural endeavour? What is the nature of the authority of the State? Has the State, for instance, unlimited power to regulate the thought and activities of individuals or are there limitations to its powers? Has the individual rights against the State? The reconciliation of the authority of the State with the liberty of the individual in order to promote social good on the largest possible scale is thus the fundamental problem of political theory. And, since the freedom of the individual is

<sup>1</sup> The term Politics is derived from the Greek word *polis*, a city-state.

considerably affected by the form of government under which he lives and by the relation of his State to other States, forms of government and inter-State relations are also of great importance to political theory

Political theory is thus concerned with the formulation of the ends and limits of State authority. Government is the instrument by means of which the purposes of the State are sought to be realized. A study of Politics should, therefore, naturally include an analysis of government and its working. This is the subject-matter of the second part of our study, viz political organization. The forms and the working of government have not, however, always been of the same pattern. Thus in ancient Greece and Rome, monarchy was the earliest form of government, in both, it gave place first to aristocracy and then to democracy. The study of these forms of government, as they arose under particular historical conditions, should obviously form the first part of a study of political organization. The working of modern governments with their infinite variety comes next. And, finally, from a study of the past and the present, the student will be in a position to formulate, by an inductive process, principles regarding the organization of government, its structure and working. For instance, a study of governments, past and present, tells us that all power corrupts, and absolute power corrupts absolutely<sup>1</sup>, therefore power must be a check to power. Such a study helps one not only to understand the principles of governmental organization but also to learn the comparative merits and defects of the different types of Legislature, Executive and Judiciary.

These divisions of the subject are not watertight compartments, they touch one another at various points as they all centre in the State. Politics may therefore be defined as 'the science concerned with the State and of the conditions essential to its existence and development', or, in the words of Janet, 'that part of social science which treats of the foundations of the State and the principles of government'.

## §2 IS POLITICS A SCIENCE?

At the outset of our study we are faced with a crucial question. Is Politics a science at all?

<sup>1</sup> The phrase is Lord Acton's

'Each professor of political science', writes Barker<sup>1</sup>, 'is apt to feel about the other professors, if not about himself, that they argue from questionable axioms, by a still more questionable process of logic, to conclusions that are almost unquestionably wrong. The layman, even more sceptical, is inclined to adopt towards political science the attitude of Mrs Prig to the Mrs Harris so often mentioned by Mrs Gamp. "I don't believe there's no sich a subject"'

In similar vein writes Maitland<sup>2</sup> 'When I see a good set of examination questions headed by the words "Political Science" I regret not the questions but the title' Why this hesitation?

We can explain it only if we grasp clearly the meaning of the term 'science'. The classification of facts and the formation upon that basis of absolute judgements, which are consistent and universally valid, sum up the essential aim of modern science. Thus gravitation tends to make things fall to the ground, two parts of hydrogen and one of oxygen constitute water—they cannot help themselves. These are exact statements, physics and chemistry are exact sciences. Classification, general rules based on such classification, and predictability—these are essential to the scientific method.

Let it at once be admitted that Politics is not and cannot be an exact science in the sense that physics and chemistry are. It has too few certainties. Its premisses are uncertain; its conclusions are dubious. On almost every aspect of the subject, there are at least two, and often more, views. For instance, that high authority Mill says that 'it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities'. On the contrary, Lord Acton, an equally high authority, holds that the combination of different nations in one State is as necessary a condition of civilized life as the combination of individuals to form society. Again, should there be two chambers to a Legislature? Laski and Sidgwick differ<sup>3</sup>. Is communal representation in Legislatures and the public services (as has been adopted in India) desirable? Opinions vary. Even on the definition of fundamental terms, such as the State, there is no unanimity<sup>4</sup>. R. M. MacIver differs from Laski.

<sup>1</sup> E. Barker, *Education for Citizenship*, p. 6.

<sup>2</sup> F. W. Maitland, *Collected Papers*, Vol. III, p. 302.

<sup>3</sup> See below, ch. XXVIII.

<sup>4</sup> See ch. I, §7 and ch. IV, §3.

Politics is not an exact science, like physics and chemistry, because the material with which it deals is incapable of being treated in the same exact way. Physics and chemistry are natural or physical sciences, they deal with matter. Politics, economics and ethics are social sciences, they deal with man in society. 'One chemical element is exactly the same all the world over, any variations in its composition can be tested and explained' It is difficult to consider problems of man in the same exact way as we consider problems of matter. Social phenomena are perpetually undergoing change and are more difficult to control. The motives which lead men to act, no less than the consequences of their acts, are so complex and variable that it is difficult accurately to determine the one or confidently to predict the other. Consider, for instance, the effects of the introduction of Prohibition in India, he would be a bold man who would predict that it is bound to fail in India *because* it has failed in America. Again, in the natural sciences it is possible to experiment with matter in a way impossible in the social sciences. In other words, it is possible artificially to create actual uniformities for the purpose of comparison, to make, that is to say, out of unlike things, things so alike that valid inferences can be drawn as to their behaviour in like circumstances. Thus, as Graham Wallas points out, metallurgy became a science when men could actually take two pieces of copper ore, unlike in shape and appearance and chemical constitution, and extract from them two pieces of copper so nearly alike that they would give the same results when treated in the same way. This power over his material the student of Politics can never possess. He can never create an artificial uniformity in man. 'He cannot after twenty generations of education or breeding render even two human beings sufficiently like each other for him to prophesy with any approach to certainty that they will behave alike under like circumstances'

That is why a discerning scholar like Lord Bryce was content to compare Politics to a relatively undeveloped and inexact natural science like meteorology, somewhat in the same way as Marshall had earlier compared economics to the science of the tides, in all these subjects the possibility of error in prediction is considerable. Sir Frederick Pollock maintained that there is a science of Politics in the same sense and nearly to the same extent as there is a science of morals. 'Those who deny the existence of a

political science, if they mean that there is no body of rules or law from which a prime minister may infallibly learn how to command a majority in Parliament, would be right as to the fact, but would betray a rather inadequate notion of what science is. Politics, like other social sciences, has a scientific character because the scientific method is applicable to its phenomena, viz. the accumulation of facts, the linking of these together in causal sequences and the generalization from the latter of fundamental principles or laws. It is true that the laboratory method of experiment is difficult with social sciences; but the whole field of historical facts and the facts of the contemporary world are there for the student to observe, classify, connect, and compare for the formulation of general principles. Take, for instance, the study of revolutions, their causes and cure. The revolutions of history, such as the English Revolution of 1688, the French Revolution of 1789 and the Russian Revolution of 1917, are the materials for the student to study and compare. Aristotle was able by a study of the revolutions prior to his day (he studied the history of 158 constitutions) to formulate the generalization that the most general cause of revolutionary movements was the craving of men for equality, and their best preventive, the principle of the mean. It is not only a tribute to the wisdom of Aristotle but to the possibility of the scientific character of political investigation, that this generalization applies to the revolutions since his day. The larger the number of facts studied, the wider the area from which these facts are observed, and the greater the care with which they are studied in relation to their environment, the greater the possibility of the precision and value of the generalization obtained. The development of psychology, the scientific use of history and the application of quantitative methods to political data<sup>1</sup> will enhance the claim of Politics to be considered a science.

### §3 POLITICS AND HISTORY

The subject-matter of Politics is closely related to history, economics and ethics.

History is a record of past events and movements, their causes and interrelations. It includes a survey of economic, religious, intellectual and social developments as well as a study of States,

<sup>1</sup> On this point see G. Wallas, *Human Nature in Politics*, ch. V.

their growth and organization and their relations with one another.

Politics and history are mutually interdependent. Some facts of history constitute a part of the groundwork of political science—those facts which are significant for the study of political ideas and institutions, in this sense, historical facts are the raw material of political science. On the other hand, history gains in significance and value because of political science. As Lord Acton said, the science of Politics is the one science that is deposited by the stream of history like the grains of gold in the sands of a river. Professor Seeley puts it well when he says political science is the fruit of history and history is the root of political science. To illustrate it is a lesson of history that people who are denied a share in political power are also denied a share in the benefits of power, hence the conclusion of Politics that democracy with all its defects is the safest form of government. It has been rightly remarked that Politics is vulgar when not liberalized by history, and history fades into mere literature when it loses sight of its relation to Politics.

But while political science is thus dependent on history for its material, it must be made clear that history supplies only part of its material. It has to draw largely on other social sciences such as economics, ethics, psychology, and jurisprudence—and on contemporary observation. Again, all facts of history are not useful for political science. Only those facts which bear directly or indirectly on the study of the State are useful to it. Much of history, like the history of art, of science, of inventions and discoveries, military campaigns, languages, dress, industries and religious controversies, has little, if any, relation to Politics and affords no material for political investigation. To take familiar examples, the Tudor period in English history (1485-1603) is useful to the student of political science as providing data for the study of factors leading to the establishment of absolute monarchy on a popular basis, but the rebellions and conspiracies of the period, the marriages of Henry VIII, the religious changes and persecutions, and the course of the Spanish Armada are of little value in laying down principles of political organization. Similarly, the Mogul period of Indian history (1526-1761) is of great value in Politics as providing data for the study of factors leading to the establishment (or disruption) of a unified and

stable State where the rulers belong to a militant minority alien in faith to the vast bulk of their subjects, but the rebellions, disputed successions, and military campaigns of the period, the development of Mogul art, and the evolution of the historical literature of the time, though indispensable to the student of history, are hardly of any value to the student of Politics. Political science selects facts out of history. In this selective function, the student of Politics is not limited by chronology as the student of history is. The historian has to aim primarily at presenting facts in their chronological order, the student of political science has to bring together for comparison societies similar in their political characteristics though separated in time. Thus the governments of the early Greeks, the Romans and the Teutons of Germany present many similar characteristics.

And, finally, with Sidgwick, we may add that while the primary interest of history is concrete, the presentation of facts, the primary interest of Politics is abstract, the formulation of general laws and principles.

‘What as students of political science we are primarily concerned to ascertain, is not the structure or functions of government in any particular historical community, but the distinctive characteristics of different forms of government in respect of their structure or their functions, not the particular processes of political change in (e.g.) Athens or England, but the general laws or tendencies of change exemplified by such particular processes.’<sup>1</sup>

#### §4 ECONOMICS AND POLITICS

Economics, so runs a classic definition, is a study of mankind in the ordinary business of life, it examines that part of individual and social action which is most closely connected with the attainment and with the use of the material requisites of well-being. Briefly, it is the science of wealth. Economics touches Politics at more than one point because the production and the distribution of wealth are largely influenced by government, and because the solution of many economic problems must come through political channels. Indeed, so close is the influence of Politics on economic conditions that early writers on economics considered their subject as a branch of Politics and termed it political economy. Taxation, tariff laws, government ownership

<sup>1</sup> H. Sidgwick, *The Development of European Polity*, p. 2



of public utilities like railways and electricity, and State aid to agriculture and industry are instances where governmental policy clearly affects economic prosperity. Economic conditions in Russia differ widely from elsewhere because of the socialistic policy of its Government. Indeed many problems of the modern State are essentially economic in character: the adjustment of the claims of capital and labour, the reduction of economic inequality, nationalization, and the achievement of a stable international order.

Secondly, political ideas and institutions are themselves influenced by economic conditions. A good example in the field of ideas is the rise of socialism, which is largely a theory born out of, and advocated with a view to reduce, economic inequality. The influence of economic conditions on political institutions is illustrated by the rise of feudal government in medieval Europe, in which political power and citizenship were based on the holding of land. The rise of democracy in nineteenth-century Europe owes not a little to the Industrial Revolution, the rise of the artisan class and the growth of towns. The nature and functions of the Government of a pastoral people must differ considerably from those of the Governments of agricultural and industrial communities.

## §5 POLITICS AND ETHICS

Ethics is a branch of study which investigates the laws of morality and formulates rules of conduct. It deals with the rightness and wrongness of man's conduct and the ideals towards which man is working. What is the basis of moral obligation? What do we mean by right action? How are we to distinguish a right action from a wrong one? These are some of the questions with which ethics concerns itself.

If, as Lord Acton said, the great question for Politics is to discover not what Governments prescribe, but what they ought to prescribe, the connexion between ethics and Politics is clear, for on every political issue, the question may be raised, whether it is right or wrong. And, if we agree with Fox that what is morally wrong can never be politically right, we may say that Politics is conditioned by ethics. Political theory is concerned with the end of the State, the rights of individuals, the functions

of government and the relations of State with State. Every one of these has a moral aspect. The end of the State has been formulated by the greatest political thinkers in terms of moral values. Aristotle, for instance, said that while the State comes into existence for the sake of life, it continues to exist for the sake of *good* life. The rights of individuals which deserve recognition by the State can be defined only in a moral context. The State exists to promote social good on the largest possible scale. If that object is to be achieved, the State has progressively to recognize and embody the fundamental rights of man, political, economic and private, the basis of these rights is the membership of man in society and the moral order underlying social relations. If the State does not recognize these rights, has the individual the right of non-co-operation and resistance? The question cannot be answered on the purely political plane. The Government proposes to pass laws prohibiting usury, drink, early marriage and untouchability. Is it right to do so? Again, the State proposes to consider a treaty with a neighbouring State as a 'scrap of paper'. Is this right? Can a prince, following Machiavelli's advice, be both fox and lion?

'A prudent ruler ought not to keep faith', said Machiavelli, 'when by so doing it would be against his interest, and when the reasons which made him bind himself no longer exist. If men were all good, this precept would not be a good one, but as they are bad, and would not observe their faith with you, so you are not bound to keep faith with them.'

Is this sound political theory? Is there a difference between public morality and private morality? Briefly, in so far as Politics is concerned with questions of 'ought to be' it has points of contact with ethics.

There is another aspect of their interrelation which needs mention. Laws or the commands of the State are obeyed with a greater readiness if they are in keeping with the moral ideas of the community, if they are far ahead of those ideas, they may be difficult to enforce. At the same time laws may slowly and in the long run modify moral standards by 'civic habituation'.

## §6 STATE AND GOVERNMENT

Some essentials of a State have been implied in a preceding discussion. They are (1) a definite territory, (2) population,

(iii) a government. We may add a fourth to complete the list, namely, sovereignty. These points need some elaboration

That a State should have some territory is obvious, it is obvious, too, that no limit or uniformity can be prescribed in respect of the size of States. It is reckoned that there are some 76 organized States at the present time in the world, these vary considerably in area from San Marino in Italy with its 38 square miles, British India with 863,446, the United States of America with 3,735,223 to the Union of Soviet Socialist Republics with 8,348,094.<sup>1</sup> Variety apart, the insistence on a definite territory as an essential of a State is necessary, for it distinguishes the State from a nomadic tribe. As will be shown later<sup>2</sup>, the distinctive mark of a tribe is kinship. Territoriality is not essential to a tribe but is for a State.

As with territory so with population. It is obviously essential, but neither the minimum population necessary to constitute a State nor the optimum can be prescribed. In modern States the variation ranges from about 5,000 people in the State of Andorra in the Pyrenees to more than 422 millions in China.

While uniformity in territory or population cannot be expected of States, it is noteworthy that the size of States may be an important factor in determining their fortunes. In ancient Greece, the prevalent type of State was the small city-state which could be taken in at a single view. Some of the city-states like Athens attained a richness and variety of life which many bigger modern country-States might well envy. That is primarily because the smaller the size, the greater the unity and patriotism among the people and the concentration of energy in promoting social happiness.

'To the size of States,' wrote Aristotle,<sup>3</sup> 'there is a limit, as there is to other things, plants, animals, implements, for none of these retain their natural power when they are too large or too small, but they either wholly lose their nature, or are spoiled. For example, a ship which is only a span long will not be a ship at all, nor a ship a quarter of a mile long, yet there may be a ship of a certain size, either too large or too small, which will still be a ship, but bad for sailing. In like manner a State when composed of too few is not, as a State ought to be, self-sufficing, when of too many, though self-sufficing in all mere necessities, it

<sup>1</sup> The figures are taken from *The Statesman's Year Book*, 1943.

<sup>2</sup> See below, ch. II, §§9-11. <sup>3</sup> *Politics* (Jowett's translation), VII, 4.

is a nation and not a State, being almost incapable of constitutional government'

On the other hand, small States are relatively less secure, as they fall an easy prey to bigger and aggressive States

Government may be defined as the agency or machinery through which the will of the State is formulated, expressed and realized. Properly speaking, therefore, the term includes the sum total of the legislative, executive and judicial bodies in the State, whether of the central or local government, of all those who are engaged in making, administering and interpreting law.

Government has three departments—the Legislature, the Executive and the Judiciary. The primary function of the Legislature is to make laws; of the Executive, to carry them out, and of the Judiciary, to interpret them and decide upon their application in individual cases. A sharp separation of the functions of these three branches is, however, never made in practice and is not desirable either. The Legislature, everywhere, has some degree of control over the Executive and Judiciary, and in some States, as in the United States of America, shares in some executive functions; the Executive has some initiative and considerable influence in the making of law, and exercises certain judicial powers, judges, as Justice Holmes said, 'do and must make law', and in many States have also the power of sitting in judgement on the work of executive officials. Nevertheless, the distinction between the three departments is well worth making and is well recognized both in theory and practice.

Sovereignty means supremacy, and may be defined as the power of the State to make laws and enforce them with all the means of coercion it cares to employ. It is the distinctive mark of the State, distinguishing it alike from individuals and associations within the State. It has two aspects, internal and external. Internally, it means the power which the State claims to make and enforce law upon individuals and associations within the area of its jurisdiction. Externally, it means independence of foreign control. Britain refuses to be controlled by France and vice versa. To the extent that some 'States' are subject to a foreign State, as Indian States are, they must be deemed to lack one of the essential features of a real State.

Taking these characteristics into consideration, we may define the State as

'a territorial society divided into Government and subjects claiming, within its allotted physical area, a supremacy over all other institutions' <sup>1</sup>

The distinction between State and Government is worth emphasis. From the preceding discussion, it must be obvious that the Government is a narrower term than the State, being only one part of it. The State includes both the Government and the governed. Government is only the machinery through which the purposes of the State are sought to be realized. Again, sovereignty is a characteristic of the State, not of the Government, though it may be exercised by the Government on behalf of the State. Moreover, the State is relatively more permanent than the Government, as the Government of a State frequently changes.

### §7 STATE AND SOCIETY

We must also distinguish the State from Society. Society is an association of human beings and suggests the whole complex of the relations of man to his fellows. It consists of the complicated network of groups and institutions expressing human association. The State is one of the groups, a society, not Society. It is the most important group, but still not identical with society. There are many groups in Society like the family, the caste, the church and the trade union which do influence social life, but which owe neither their origin nor their inspiration to the State. Again, there are social forces like custom, imitation and competition which the State may protect or modify but certainly does not create, and 'social motives like friendship or jealousy which establish relationships too intimate and personal to be controlled by the great engine of the State'.

The State is a way of regulating human conduct, it orders us not to murder, it punishes us for a violation of its order. It is Society in its political aspect.

The differences between the State and Society may be summarized thus. (i) Society is a wider term than the State. It suggests many social relationships which cannot be expressed through the State, e.g. education, religion, agricultural and industrial activities, domestic institutions. The State is concerned only with those social relationships that express themselves through government. (ii) The term 'society' applies to all human communities whether

<sup>1</sup> H. J. Laski, *A Grammar of Politics*, p. 21

organized or unorganized; but organization for law is essential to a State

'In the earliest phases, among hunters, fishers, root-diggers, and fruit-gatherers, there have been social groups which knew nothing or almost nothing of the State. Today, there remain simple peoples, such as certain groups of Eskimos, which have no recognizable political organization'<sup>1</sup>

While the State is not identical with Society, nevertheless it provides the framework of the social order—it holds Society together. It binds individuals to certain uniform rules of behaviour which are essential for a harmonious and ordered social life. On that account, however, we must not exaggerate the importance of the State and assume that the individual in Society will obey no rules unless they are backed by the coercive power of the State. Social tolerance and intolerance support a whole mass of habits and customs which are vital to the well-being of Society, e.g. standards of conduct in private and public life, which are not suitable subjects for legislation. These latter form the province of social morality. As Barker puts it, the area of Society is voluntary co-operation, its energy is goodwill and its method is elasticity, while the area of the State is mechanical action, its energy is force and its method is rigidity.

The distinction we have made between the State and Society is fundamental to a true theory of the State, because it helps the realization of individual freedom. To equate State with Society would justify State interference in all aspects of the life of the individual. That may lead to over-government, a totalitarian view of the State, and the consequent tyranny of State control. That, in fact, is what happens in the totalitarian States of Germany, Russia and Italy, which make no distinction between the State and Society. Individual freedom suffers.

## §8 NATIONALITY AND NATION

The idea of nationality is not easy to define, for there is not one single factor to which it can be traced. It is essentially a sentiment of unity, the resultant of many forces, community of race and language, geographic unity, community of religion, common political aspirations, and, above all, historical development. The presence or absence of any one or more of these fac-

<sup>1</sup> R. M. MacIver, *The Modern State*, 1928, p. 5

tors does not necessarily imply the presence or the absence of a spirit of nationality. The example of the people of the United States of America shows that race is of doubtful importance; the Swiss defy the difficulties presented by a variety of languages, the history of the Jews shows it may be the aspiration towards the recovery of a homeland rather than the possession of one that is important. Nationality is essentially spiritual in character, a sentiment, the will of a people to live together—the *vouloir vivre collectif*. In Laski's words<sup>1</sup>, it implies the sense of a special unity, which marks off those who share in it from the rest of mankind.

'That unity is the outcome of a common history, of victories won and traditions created by a corporate effort. There grows up a sense of kinship which binds men into oneness. They recognize their likenesses, and emphasize their difference from other men. Their social heritage becomes distinctively their own, as a man lends his own particular character to his house. They come to have an art, a literature, recognizably distinct from that of other nations. So England only could have produced Shakespeare and Dickens, so we admit that there are qualities in Voltaire and Kant from which they typify the nationalism of France and Germany.'

Nationality may, therefore, be defined as a spiritual sentiment or principle arising among a number of people usually of the same race, resident on the same territory, sharing a common language, the same religion, similar history and traditions, common interests, with common political associations and common ideals of political unity.<sup>2</sup> The term is also applied to the people who feel the sense of nationality. A portion of mankind may be said to constitute a nationality, if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively (Mill).

The term 'nation' is obviously allied to nationality, both being from the same Latin root *natus* meaning birth. Some writers, e.g. Burgess and Leacock, have defined the term in a racial or ethnographical sense. Thus Burgess defines a nation as a population with ethnic unity, inhabiting a territory with geographic

<sup>1</sup> 1 *Grammar of Politics*, pp. 219-20

<sup>2</sup> R. N. Gilchrist, *Principles of Political Science*, 6th ed., pp. 26-7

unity Leacock similarly says that it indicates a body of people united by common descent and a common language. In recent times, however, especially since the Great War of 1914-18, the term 'nation' has had a more distinctively political connotation: it has stood for a people who feel united and have or desire an independent Government. There has been a more pronounced tendency to create States on the principle of self-determination. 'one nationality, one State.' The definitions given by Bryce and Ramsay Muir, and, still more, by R. N. Gilchrist and C. J. H. Hayes, show the recent emphasis on the political aspect.

'A nation is a nationality which has organized itself into a political body either independent or desiring to be independent' (Bryce)

'A nation is a body of people who feel themselves to be naturally linked together by certain affinities which are so strong and real for them that they can live happily together, are dissatisfied when disunited and cannot tolerate subjection to peoples who do not share these ties' (Ramsay Muir)

'Nation is the State *plus* something else the State looked at from a certain point of view, viz that of the unity of the people organized in one State' (Gilchrist)

'A nationality by acquiring unity and sovereign independence becomes a nation' (Hayes)

### *State and nation*

The distinction between State and nation must be made carefully. According to our definition, a State exists where there is a territory, a people, a government and sovereignty, it may lack the feeling of nationality, or of oneness among the people, and yet remain a State. The classic example is Austria-Hungary before the war of 1914-18, it was a State but not a nation. The term 'nation' emphasizes the consciousness of unity among its people, and, according to the older view which we have indicated, a nation need not necessarily be a State. Recently, however, there has been a tendency both in theory and in fact to associate Statehood with nationhood, to equate nation with a united people organized in a State.

Is this principle of organizing States on the principle of 'one nation, one State' a sound one? Has every nationality the right to form a State? It is true that a 'mono-national', as distinguished from a 'poly-national', State has some distinct advant-



ages • it facilitates harmony among its parts and engenders a sense of compromise and tolerance among its people which make it relatively easy for them to work democratic institutions That is why Mill insisted that it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities The sense of belonging together creates a readiness on the part of the members of a State to subordinate their differences to the common good. A political society is, clearly, in an unsatisfactory condition when its members have no consciousness of any bond of unity among them except obedience to a common government

There lurks, however, in this coincidence a danger pointed out by Lord Acton, to which too little attention has been given. That danger is that, under such conditions, the majority may be tempted to increase the sphere of political regulation and enforce ways of behaviour which are akin to totalitarianism Said Acton <sup>1</sup>

‘ The presence of different nations under the same sovereignty is similar in its effect to the independence of the Church in the State It provides against the servility which flourishes under the shadow of a single authority by balancing interests, multiplying associations, and giving to the subject the restraint and support of a combined opinion In the same way it promotes independence by forming definite groups of public opinion and by affording a real source and centre of political sentiments and of notions of duty not derived from the sovereign will Diversity in the same State is a firm barrier against the intrusion of government beyond the political sphere, which is common to all, into the social department which escapes legislation ’

Acton held that the combination of different nations in one State is as necessary a condition of civilized life as the combination of individuals to form society. Inferior races make progress by living in political union with races intellectually superior Exhausted and decaying nations are revived by their contact with a younger vitality Nations in which the elements of organization and the capacity for government have been lost, either through the demoralizing influence of despotism or the disintegrating action of democracy, are restored and educated anew under the discipline of a stronger and a less corrupted race This fertilizing and regenerating process can only be obtained by living under

<sup>1</sup> *The History of Freedom and other Essays*, pp 289-90

one Government The 'poly-national' view has the merit of drawing attention to the healthy idea that not every people is capable of creating and maintaining a State, only a people of political capacity, possessing manly qualities, understanding and courage, and able to defend itself, can rightly claim to establish an independent State Events since 1939 only reinforce the strength of this view. The dissociation of Statehood from nationhood will help to mitigate much disquiet and frustration in the world and help to establish international peace

### *Is India a nation?*

It is perhaps best to describe India as 'a nation in the making' In a sense, she lacks the characteristics of Statehood and nationality She is still dependent on a foreign State and thus lacks one essential characteristic of a State, namely sovereign authority Her people have not yet attained a true spirit of nationality, on account of the difficulties produced by the existence of several religions and languages and differing customs amongst them But there are a number of compensating factors on the credit side The use of English and Hindi is enabling the people from different parts of India to understand the ideas and needs of one another, improved communications and means of transport are bringing about a large measure of economic unity, the land of India is clearly a unit by itself, and the common desire for self-government may be expected to overcome the difficulties presented by separatist tendencies

There are some who think that India consists of two nations, the Hindu and the Muslim, and therefore ought to be split up into two nation States, Hindustan and Pakistan. They make much of the differences in the social codes of the Hindus and the Muslims This 'Pakistan' movement, as it is known, must be considered a passing phase in the development of India into one nation An emphasis on the centripetal tendencies, on the common factors that unite the two peoples, Hindu and Muslim, and on the geographic unity, a realization of the danger of very small States in modern times and a satisfactory solution of the communal problem, ensuring adequate safeguards for minorities, may be expected to overcome the obstacles that still prevent India's attainment of full nationhood

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## CHAPTER II

# THE ORIGIN OF THE STATE

### §1 INTRODUCTORY

Among the first questions which political theory raises is What is the origin of the State? Have men always lived under some form of political organization? If they have not, what are the causes that brought about the original establishment of government?

Political thinkers are not agreed on the answer to this fundamental question, with the result that there are various theories concerning the beginnings of the State the social contract theory, the divine right theory, the force theory, the patriarchal theory, the matriarchal theory and the evolutionary theory. We shall state these theories, examine the element of truth in them and conclude with what we consider to be the generally accepted explanation

### §2 THE SOCIAL CONTRACT THEORY:

#### ITS EARLY HISTORY

The substance of the social contract theory is this. The State is the result of an agreement entered into by men who originally had no governmental organization. The history of the world is thus divisible into two clear periods the period before the State was instituted and the period after. In the first period, there being no government, there was no law which could be enforced by a coercive authority. Men lived, it was said, in a state of nature, in which they were subject only to such regulations as nature was supposed to prescribe. But there was no human authority to formulate these rules precisely or to enforce them. After some time, they decided to set up a government. Thereby, they parted with their natural liberty and agreed to obey the laws prescribed by the Government. [How men lived in the state of nature without the coercive agency of a government, why they decided to establish a government, who were the

parties to the contract, and what the terms of that contract were — on these and other details there are differences of opinion among the exponents of the theory) But they agree on its essential idea, viz that the State is a human creation, the result of a contract.

The idea of a social contract is found in the political treatises both of the East and the West Kautilya, the minister of Chandragupta Maurya of India, refers to this in his *Arthashastra*<sup>1</sup> (c 321-300 B C) 'People suffering from anarchy, as illustrated by the proverbial tendency of a large fish swallowing a small one, first elected Manu to be their king, and allotted one-sixth of the grains grown and one-tenth of their merchandise as sovereign dues Supported by this payment, kings took upon themselves the responsibility of maintaining the safety and security of their subjects' There is a reference to it in the writings of the Greek thinker, Plato (428-347 B C) In his work, the *Crito*<sup>2</sup>, Socrates is represented as awaiting calmly the execution of his sentence, even though he considered it unjust, because he would not break his *covenant* with the State by escaping from prison into exile Again, in the *Republic*, Glaucon puts forth the view, in the course of a discussion on justice, that legislation and contracts between man and man originated in a compact of mutual abstinence from injustice

In political discussions, the theory of social contract became significant during and after the Middle Ages Two forms of the theory are found in these discussions, viz the governmental contract and the social contract proper The first postulates a tacit agreement between the Government and the people, and the second, the institution of a political society by means of a compact among individuals

The idea of a governmental contract was largely employed by the defenders of popular liberties in the Middle Ages to resist the claim of rulers to an absolute dominion over their subjects. Thus Manegold, in the eleventh century, developed the idea that a king could be deposed when he had violated the agreement according to which he was chosen<sup>3</sup>

'No man can make himself emperor or king, a people sets a man over it to the end that he may rule justly, giving to every

<sup>1</sup> Bk I, ch XIII

<sup>2</sup> *Socratic Discourses*, 'Everyman's Library', p 359, vii

<sup>3</sup> Quoted by Carlyle in *A History of Mediaeval Political Theory in the West*, Vol III, p 164, n 1

man his own, aiding good men and coercing bad, in short, that he may give justice to all men. If then he violates the *agreement* according to which he was chosen, disturbing and confounding the very things which he was meant to put in order, reason dictates that he absolves the people from their obedience, especially when he has himself first broken the faith which bound him and the people together.

By his 'oath at his coronation' a king was supposed to have made a pact with his people to promote a happy and virtuous life, and if he failed to fulfil his implied pact with his people he ceased to deserve, says St Thomas Aquinas (c. 1225-74), that the pact should be kept by the latter. The same note is struck in *The Grounds of Rights Against Tyrants* by Du Plessis-Mornay (1579), *On the Sovereign Power Among the Scots* by Buchanan (1579), and *On Kingship and Education of a King* by Mariana (1599). An important recognition of the theory was the declaration of the Convention Parliament in England in 1688 that James II 'having endeavoured to subvert the constitution by breaking the original contract between king and people' had rendered the throne vacant.

The social contract, as distinguished from the governmental contract, is probably first mentioned in Hooker's *The Laws of Ecclesiastical Polity* (1594-7). Hooker postulates an original state of nature in which men were subject only to the law of nature. In course of time men realized that to remove the grievances which inevitably arose when men associated together, there was no way but 'by growing into composition and agreement amongst themselves, by ordaining some kind of government public, and by yielding themselves subject thereunto'. On the continent, the German writer Althusius used the idea of an original social contract in constructing his political system (1603). We find the compact theory applied in practice by the Pilgrim Fathers on board the *Mayflower* (1620). 'We do solemnly and mutually in the Presence of God and of one another covenant and combine ourselves together into a civil body politic' Milton in his *Tenure of Kings and Magistrates* (1649) argued that men were born free, and that wrong sprang up through Adam's sin, wherefore to avert their own complete destruction men 'agreed by common league to bind each other from mutual injury, and jointly to defend themselves against any that gave disturbance or opposition to such agreement'.

‘The power of kings and magistrates is nothing else, but what is only derivative, transferred, and committed to them in trust from the people, to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken from them, without a violation of their natural birthright’

We shall now consider the theory as developed by its most famous exponents, Hobbes, Locke and Rousseau, during the latter half of the seventeenth century and in the eighteenth.

### §3 HOBBS

Hobbes (1588-1679) was an Englishman who lived in the days of the Civil War (1642-51) This fact is significant in explaining the nature of his political thought, for, as will be shown presently, Hobbes was inclined towards absolutism This inclination was natural at a time when the most important need of the country was a strong government to maintain law and order

Hobbes starts his political inquiry (*The Leviathan*, 1651) with an analysis of human nature man is essentially selfish, he is moved to action not by his intellect or reason, but by his appetites, desires and passions Men living without any common power set over them, i.e. in a state of nature, would be ‘in that condition which is called Warre, and such a warre, as is of every man, against every man’—not war in the organized sense but a perpetual struggle of all against all, competition, diffidence and love of glory being the three main causes Law and justice are absent The life of man is solitary, poor, nasty, brutish and short

Hobbes recognizes that even in the primitive natural state, there are in some sense laws of nature. Their essence is self-preservation, ‘the liberty each man hath to preserve his own life’. In detail, these laws are . to seek peace and follow it, to relinquish the right to all things which being retained hinder the peace of mankind, to ‘perform their covenants made’

The only way to peace is for men to give up so much of their natural rights as is inconsistent with living in peace A supreme coercive power is instituted The contracting parties are not the community and the Government, but subject and subject. Every man says to every other

‘I authorize and give up my right of governing myself to this man or this assembly of men [government] on this condition that thou give up thy right to him and authorize *all* his actions in like manner’

A State is thus created

Certain consequences follow from the creation of a State in this manner

1. The Government is sovereign, and the sovereign's power is absolute, for,

(i) The sovereign's power is not held 'on condition' since the sovereign is the result of the pact, not a party to it

(ii) The pact is not revocable at the pleasure of the subjects

(iii) Men surrender all their rights to the sovereign

(iv) As the sovereign embodies in himself the wills of all, his actions are virtually their actions, on the principle that 'who-soever acts through his agent, acts through himself'

(v) The anti-social instincts of man are too insistent to be checked except by absolute authority

Sovereignty is inalienable, for it is essential to civil government that there should be no power in the State strong enough to gainsay the sovereign. For the same reason, sovereignty is indivisible and the sovereign is unpunishable. The sovereign is judge of what is necessary for the peace and defence of his subjects and judge of what doctrines are fit to be taught. He has the right of making rules whereby each subject may know to what personal property he is entitled. He has the right of judicature, of making war and peace, of choosing counsellors, of rewarding, honouring and punishing.

Hobbes is aware that the sovereign thus defined need not necessarily be one man, sovereignty may be located in an assembly. Yet he prefers monarchy because it has greater consistency, and freedom from fluctuation in policy. Also, there are relatively fewer favourites in a monarchy and, above all, there is the maximum identity of public and private interest in that form of government.

2. Law is, in general, not counsel but command

'Civil law is to every subject those rules which the Commonwealth hath commanded him by word, writing or other sufficient sign of the will to make use of for the distinction of right and wrong'

3. The liberty of the subject consists in

(i) Those rights which the sovereign has permitted

(ii) Those rights which by the law of nature, of self-preser-



vation, cannot be surrendered. The subject cannot therefore be compelled to kill himself or to abstain from food or medicine, he is also not bound to accuse himself.

(iii) In general the obligation of the subjects to the sovereign lasts no longer than his power to protect them.

(iv) As for other liberties, they depend on the silence of the law, the subject being free to do what the sovereign has not prohibited.

Hobbes thus bases an absolute State on 'free' contract and consent, the psychological basis of his theory is fear. These ideas of Hobbes have been criticized from several points of view. The theory of social contract is unhistorical, because primitive society rested on status, not on contract,<sup>1</sup> his view of human nature as essentially selfish cannot be maintained, he is prepared to believe in a being who is a savage in the state of nature and a saint in the state of contract, his contention that men surrender all their natural rights is an insult to common sense. Again, Hobbes failed to realize that the principle involved in absolute sovereignty is wrong, for, if the sovereign is all-powerful and stands above law, the citizen must be prepared to submit to his arbitrary pleasure, it is possible that this position may prove to be worse than it was prior to the contract. Above all, Hobbes gives us a purely legal view of rights as claims recognized by the State. Such a view is insufficient for political philosophy, for a legal theory of rights will tell us what in fact the character of a State is, it will not tell us whether the rights recognized by it are the rights which need recognition, or whether other rights do not deserve legal recognition. It will tell us, for instance, that according to Hindu law polygamy is recognized, and a daughter's right to inherit along with the son is not recognized. There is no good reason why the former should be recognized or the latter should not be recognized.

If, then, it be asked why Hobbes' influence persists, the answer is, as Ivor Brown puts it, he was the first great philosopher of discipline. Those who think about political affairs and the nature of society fall, intellectually and temperamentally, into two main schools. One party believes that the most essential requisites for human welfare in society are law and order, the other believes in the ultimate value of individual liberty, seeing

<sup>1</sup> See below, p. 33

that if liberty does not exist in and for individuals, it does not exist at all. Those of 'the law and order school' see in Hobbes the first Englishman to give a complete and logical expression to the doctrine of sovereignty. As Pollock says, 'Hobbes defines legal sovereignty and legal obligation with admirable strength and precision.'

## §4 LOCKE

The purpose of Locke (1632-1704) in his *Two Treatises of Government* (1690) was to justify the English Revolution of 1688. James II had been deposed from the throne and William of Orange invited to occupy it. Locke sought, as he said, to 'establish the throne of our great Restorer, our present King William, and make good his title in the consent of the people'.

Locke's argument is somewhat as follows — In the state of nature men are free and equal, each lives according to his own liking. This freedom, however, is not licence. There is a natural law or the law of reason which commands that no one shall impair the life, the health, the freedom or the possessions of another. It is significant that the law of nature of Locke stresses the freedom and preservation of all men, unlike that of Hobbes which emphasizes self-preservation. There is, however, no common superior to enforce the law of reason, each individual is obliged to work out his own interpretation. The result is that while the state of nature is not a state of war (as it is in Hobbes' view), it is still 'full of fears and continual dangers', and man's enjoyment of rights is 'very insecure'. Therefore, the peace among men may be so precarious as not to be easily distinguishable from the anarchy depicted by Hobbes.

The State or political society is instituted by way of remedy for the inconveniences of the state of nature — to avert, not to escape from, a state of war. These inconveniences are three-fold: first, the want of an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies; secondly, the want of a known and disinterested judge, with authority to determine all differences according to the established law; thirdly, the want of power to back and support the sentence when right and to give it due execution. The State is created by Locke through the medium of a contract in which

each individual agrees with every other to give up to the community the natural right of enforcing the law of reason, in order that life, liberty and property may be preserved. Locke, unlike Hobbes, gives the power to the community and not to a government The contract, it may be stressed, is also not general, but limited and specific, for, the natural right of enforcing the law of reason alone is given up. the natural rights of life, liberty and property reserved to the individual limit the just power of the community.

‘The legislative power, constituted by the consent of the people,<sup>1</sup> becomes the supreme power in the commonwealth, but is not arbitrary. It must be exercised, as it is given, for the good of the subjects. Government is in the nature of a trust and embraces only such powers as were transferred at the time of the change from a state of nature. The Legislature must dispense justice by standing laws and authorized judges, no man can be deprived of his property without his consent, nor can taxes be levied without the consent of the people or their representatives. Finally, the Legislature cannot transfer its powers to any other person or body. It is but a delegated power from the people, who alone can dispose of it.’<sup>2</sup>

The people, however, can remove or alter the Legislature, when they find that it acts contrary to the trust reposed in it.

If it be asked who, then, is sovereign in Locke’s State, the answer is that there is none in Hobbes’ sense.<sup>3</sup> The community is supreme, but its supreme power is latent. Its power does not come into play so long as the Government is acting according to the trust reposed in it, but when it acts contrary to that trust, the power of the community manifests itself in their right to replace that Government by another. Thus it is integral to Locke’s system, that government may be dissolved, while society remains intact. Locke’s theory thus results in constitutional or limited government.

In the words of Laski, Locke gave to the theory of consent a permanent place in English politics. While the idea of social contract as an explanation of State origins has been given up, Locke’s central idea of ‘government resting on the consent of

<sup>1</sup> This may be considered as the second (implied) contract in Locke’s theory. To this contract, the Government is a party, in Hobbes’ theory the Government is not a party to the contract.

<sup>2</sup> *Two Treatises of Government*, ‘Everyman’s Library’, p. xv.

<sup>3</sup> Professor Carpenter in his introduction to *Two Treatises* notes that the word sovereign does not appear in Locke’s book.

the governed' is valuable. This means in practice that a Government can continue to rule a people, only if it pays heed to their wishes. Government holds power on condition. This conclusion Locke arrived at by distinguishing between the agreement to form a civil society and the agreement within that society to set up some particular Government. If the acts of that Government are contrary to the interests of the community as a whole 'it is possible for them, as Locke saw, to change the Government without destroying the continuity of civil society itself'. Locke's method of arriving at his conclusion may be criticized as being unhistorical, but he emphasizes the cardinal idea that government is a trust, and the basis of government is consent.

Secondly, Locke's concept of natural rights is of some value. In the sense in which Locke used it, as the rights of the individual anterior to organized society, it is now generally discredited. But, as T. H. Green points out, interpreted in the sense that the nature of man demands certain rights or some conditions of life which at a particular stage of civilization are necessary for the fulfilment of his personality, the concept is invaluable.

#### §5 ROUSSEAU

The social contract theory of Rousseau (1712-78) developed in his *Contrat Social* (1762) is important in two respects: it inspired the French Revolution of 1789 which was a revolt against the despotic French monarchy, it also supplied the basis of the theory of popular sovereignty.

Man, according to Rousseau, is essentially good and sympathetic, the state of nature 'is a period of idyllic happiness, men being free and equal. Soon, however, with the introduction of private property and the growth of numbers, quarrels arise and man is compelled to give up his natural freedom. His problem is 'to find a form of association which protects with the whole common force the person and property of each associate, and in virtue of which every one, while uniting himself to all, remains as free as before'. The problem is solved through a contract and the creation of civil society.

In this contract, every one surrenders to the community (and not to the Government as in Hobbes) all his rights; the surrender is as complete as in Hobbes. The community therefore becomes

sovereign Its sovereignty is as absolute as that of the Government in Hobbes is Prima facie, there is no need to limit its sovereignty in the interests of the subjects, for the sovereign body, being formed only of the individuals who constitute it, can have no interest contrary to theirs From the mere fact of its existence, it is always all that it ought to be (since from the very fact of its institution, all merely private interests are lost in it) On the other hand, the will of the individual may well conflict with that general will of the community which constitutes the sovereign Hence the social pact necessarily involves a tacit agreement that anyone refusing to conform to the general will shall be forced to do so by the whole body politic, i e 'shall be forced to be free', since the universal conformity to the general will is the guarantee to each individual of freedom from dependence on any other person or persons

It is interesting to see how, after the contract, the individual remains as free as he was before.

'Since each gives himself up to all, he gives himself up to no one, and as there is acquired over every associate the same right that is given up by himself, there is gained the equivalent of what is lost, with greater power to preserve what is left'

Law is an expression of the general will and can be made only in an assembly of the whole people

Sovereignty can never be alienated, represented or divided. The sovereign, who is a collective being, can be represented only by himself

The Government is never the same thing as the sovereign. The two are distinguished by their functions, that of the former being executive, that of the latter, legislative Government is the exercise according to law of the executive power The Government, contrary to Locke's opinion, is not established by, and therefore is not a party to, the contract 'There is only one contract in the State,' protests Rousseau, 'and this excludes every other' The act by which a government is established is twofold, consisting first of the passing of a law by the sovereign to the effect that there shall be a government, and secondly of an act in execution of this law by which the governors are appointed

Rousseau's social contract can be viewed as the fusion of the premisses and temper of Hobbes with the conclusions of Locke  
The influence of Hobbes upon Rousseau was indeed marked and

singular That the State is the result of a contract entered into by men who originally lived in a state of nature , that there was only one contract, and to this the Government was not a party , that individuals surrendered all their rights and, therefore, after making the contract they have only such rights as are allowed to them by law , that sovereignty is absolute these elements in his theory clearly recall Hobbes But, curious as it may seem, Rousseau did not agree with the conclusion of Hobbes, that the Government was absolute , he made the Government dependent upon the people and thereby accepted, in essentials, the conclusion of Locke To this conclusion he was led by two elements in his theory in which he differed from Hobbes he makes the individual surrender his rights not to the ruler but to the community , he makes a clear difference between the State and the Government. In both these respects he is nearer Locke At the same time, Rousseau differs from Locke in more ways than one He postulates a complete surrender of rights on the part of the natural man, and thereby makes sovereignty absolute , in Locke the surrender is partial, and there is no absolute sovereignty The popular sovereignty in Rousseau is in continual exercise ; the supremacy of the people in Locke is held in reserve and manifests itself only when the Government acts contrary to their trust There is only one contract, the social pact, in Rousseau , there are two contracts implied in Locke, to one of which the Government is a party , and, as Gierke noted, when Rousseau cut off the idea of a governmental compact from the contract theory, he did a revolutionary thing , he made the State absolute.

The importance of Rousseau in political thought has already been indicated His theory served as the basis for democracy and the justification of revolutions against arbitrary rule As Sidgwick points out, the revolutionary doctrine rests on two or three simple principles , that men are by nature free and equal, that the rights of government must be based on some compact freely entered into by these equal and independent individuals, and the nature of the compact is such that the individual becomes part of the sovereign people, which has the inalienable right of determining its own constitution and legislation These points are all found, for instance, in the Declaration of the Rights of Man (1789), the charter of the French Revolution , they are taken

straight from Rousseau. Rousseau indeed demonstrated once and for all that will, not force, is the basis of the State, that government depends on the consent of the governed. Rousseau's idea, that the sovereign community was logically the only lawmaker, has had the indirect effect of stimulating direct legislation by the people through the referendum and the initiative.

At the same time, it must be remarked that Rousseau's political analysis is inadequate in one respect. He was scarcely aware of the fact that the unrestricted power of the general will might result in an absolutism scarcely less formidable than that of the older kingdoms and oligarchies. To argue that the general will is always the disinterested will of the community for the common good, and therefore always right, is, as has been well said, to give a phrase where we ask for a solution. There is no guarantee that the will of the community will always turn out to be for the common good. Rousseau himself realized that the line between the general will so defined, and the will of all (which is the sum total of particularist and sectional interests) is not easy to draw. Rousseau's sovereign is the people itself gathered in solemn general assembly, without private interest, as a whole, and therefore incapable of injustice to any members. That Rousseau without reserve makes this identification of the ideal and the actual it would be unjust to say, but that his enthusiasm leads him constantly to minimize the difference is unquestionable.<sup>1</sup>

## §6 MERITS AND DEFECTS

(1) From the historical point of view, the contract theory of the origin of political authority is untenable, not only because historical records are wanting as to those early times when, if at all, such compacts must have been made, but also because what historical evidence there is, from which by inference primitive conditions may be imagined, is such as to show its impossibility. The theory presupposes individuals as contracting, when the researches of Maine show that the progress of societies has been from status to contract. Contract, according to Maine, is not the beginning but the end of society. The idea of contract postulates that individuals who enter into the contract are free to do things in their own way; but, says Maine, the evidence of early law and custom shows that primitive men had no such freedom.

<sup>1</sup> See H. J. Tozer in his introduction to *The Social Contract*, pp. 44-69.

Primitive society rested not upon contract but upon *status*. In that society, men were born into the station and the part they were to play throughout life. It was not a matter of choice or of voluntary arrangement in what relations men were to stand towards one another as individuals. 'He who is born a slave, let him remain a slave, the artisan, an artisan, the priest, a priest'—is the command of the law of *status*. Merit, aptitude, and individual freedom were allowed to operate only within the sphere of each man's birthright. Under such conditions, the very idea of individuals contracting themselves into civil society seems improbable.

(ii) Even granting that an example of an original contract could be found, it cannot necessarily bind the descendants of those who originally entered into the contract.

'I am bound to obey,' said Bentham, 'not because my great-grandfather may be regarded as having made a bargain which he did not really make with the great-grandfather of George III, but simply because rebellion does more harm than good.'

(iii) The theory is dangerous in practice, for it is favourable to anarchy. The State and its institutions are regarded as the result of the individual will, and, therefore, it may be argued, they can have no sufficient authority when they contradict this individual will. Burke states this point well in his famous description of the State.

'It ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco or some other such low concern, to be taken up for a little temporary interest and to be dissolved by the fancy of the parties. It is to be looked on with other reverence. It is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.'

(iv) More than one exponent of the theory assumes that men in a state of nature are equal. This assumption is incorrect. It is possible to argue with the German jurist von Haller (1768-1854) that inequality, rather than equality, is natural.

(v) The theory is illogical. 'It presupposes such political consciousness in a people who are merely living in a state of



nature as could only be possible in individuals who are already within a State.' As Leacock says, they must have known what a government was before they could make one.

With all its defects, the theory has some merits. It reminds the Government of those human purposes which the State can serve and which alone can justify its existence. As Kant, the German philosopher, said 'The legislator is under the obligation to order his laws as if they were the outcome of a social contract.' In the form given to it by Locke and Rousseau, the theory brought out the idea that civil society rests not on the consent of the ruler but of the ruled, and thus became an important factor in the development of modern democracy.

### §7 THE THEORY OF DIVINE ORIGIN

The theory of divine origin, known more familiarly as the theory of the divine right of kings, states three simple propositions the State has been established by an ordinance of God, its rulers are divinely appointed, they are accountable to no authority but God. Thus we are told in the Bible <sup>1</sup>

'Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.'

Filmer in his *Patriarcha* (1680) argues that Adam was the first king and 'present kings are, or are to be reputed, next heir to him'. In the great Indian epic, the *Mahabharata*, it is recounted <sup>2</sup> that when the world was in a state of nature and anarchy, the people approached God and requested him to provide a remedy. 'Without a chief, O Lord,' they said, 'we are perishing. Give us a chief whom we shall worship in concert and who will protect us.' God appointed Manu to rule over them. The essence of the theory, held whether in the east or the west, is not only that God created the State in the sense that all human institutions may be believed to have had their origin in divine creation, the will of God is supposed to be made known by revelation mediately or immediately to certain persons who were his earthly vice-regents and by them communicated to the people.

<sup>1</sup> *Romans*, xiii, 1-2

<sup>2</sup> *Santiparvan*, lxvii, cited in U. Ghoshal, *A History of Hindu Political Theories*, p. 175.

Obedience to the State becomes a religious as well as a civil duty ; disobedience, sacrilege

The importance of the theory is primarily historical ; it helped to support the claims of certain rulers, like James I of England, to govern absolutely and without being accountable to their people. Indeed James I even told his Parliament :

‘ A king can never be monstrously vicious. Even if a king is wicked, it means God has sent him as a punishment for people’s sins and it is unlawful to shake off the burden which God has laid upon them. Patience, earnest prayer, and amendment of their lives are the only lawful means to move God to relieve them of that heavy curse.’

It is interesting, however, to note that in ancient India the divine right theory was not stretched to include the view that the bad as well as the good ruler was the representative of God and as such entitled to unconditional obedience. On the contrary, its implications were explored to justify rebellion against a tyrannical king. The argument is a simple one—a virtuous king is no doubt a *part* of the gods and is entitled to co-operation and obedience, but the king who is otherwise is a *part* of the demons. Therefore he may be deposed and even slain.<sup>1</sup>

As an explanation of the origin of the State, the theory is now generally discredited, because it necessarily involves propositions that are to be accepted as matters of faith rather than of reason. As J. N. Figgis rightly says, if at the present time the theory finds little acceptance, it is because there is a general belief either that reason should reign supreme, or that, if faith, as distinguished from reasoned conviction, be conceded to have a proper place in the life of men, its precepts should relate exclusively to matters spiritual. In spite of the obvious defect of the theory, that it leaves the community at the mercy of a despot, it has the merit that idealistically interpreted it may create in the mass of the people a sense of the value of order and obedience to law, so necessary for the stability of the State—and in the rulers a moral accountability to God for the manner in which they exercise their power.

<sup>1</sup> The *Mahabharata* and *Sukraniti*, see U. Ghoshal, *op cit*, pp. 219-248-9. Perhaps Narada is an exception, for he alone among Hindu theorists seems to support absolute non-resistance on the part of the people.

## §8 THE THEORY OF FORCE

In its simplest form, this theory may be stated thus 'War begat the king.' The State is the result of the subjugation of the weaker by the stronger. Thus Gregory VII wrote in 1080.

'Which of us is ignorant that kings and lords have had their origin in those who, ignorant of God, by arrogance, rapine, perfidy, slaughter, by every crime with the devil agitating as the prince of the world, have contrived to rule over their fellow men with blind cupidity and intolerable presumption?'

In the eighteenth century, Hume gave expression to similar ideas 'It is probable', said he,<sup>1</sup> 'that the first ascendant of one man over multitudes began during a state of war, where the superiority of courage and of genius discovers itself most visibly, where unanimity and concert are most requisite, and where the pernicious effects of disorder are most sensibly felt. The long continuance of that state, an incident common among savage tribes, inured the people to submission.' Jenks<sup>2</sup> is perhaps the best modern exponent of the theory. 'Historically speaking,' says he, 'there is not the slightest difficulty in proving that all political communities of the modern type owe their existence to successful warfare.' His general argument is somewhat as follows.<sup>3</sup> With the increase of population and the consequent pressure on the means of subsistence, there was also an improvement in the art of warfare. Fighting became the work of specialists. A State is founded when a leader, with his band of warriors, gets permanent control of a definite territory of a considerable size. This may occur in one of two ways. The leader, after firmly establishing his position as ruler of his own tribe, extends his authority over neighbouring tribes until he comes to rule over a large territory. This is what seems to have happened in the England of the ninth century, when the so-called tribal kingdoms of the Heptarchy,<sup>4</sup> after fluctuating for many years between the overlordship of the various tribal chiefs, became more or less consolidated by conquest in the time of Egbert (A.D. 802-39). Much the same thing happened in Scandinavia, where, in the ninth century, 'the innumerable tribes became gradually consolidated, as the result of hard fighting, into the three historic kingdoms of Norway, Denmark and

<sup>1</sup> D. Hume, *Essays*, V 'Of the Origin of Government'

<sup>2</sup> E. Jenks, *A History of Politics*, p. 71

<sup>3</sup> *ibid.*, pp. 74-5

<sup>4</sup> i.e. Northumbria, Mercia, East Anglia, Essex, Kent, Sussex and Wessex

Sweden' Or a State is founded by successful migrations and conquests This was the history, in very early times, of the foundation of the kingdoms of Lombardy and of Spain Perhaps the most remarkable instance of this is supplied by the history of the Normans, 'who, in the ninth century, became the ruling power in Russia, in the tenth founded the practically independent Duchy of Normandy, in the eleventh, the new kingdom of England, and in the twelfth, the kingdom of the Sicilies'.

The new type of community, whether founded by consolidation or by migration and conquest, differed from the tribe in one essential particular it was *territorial* in character, i.e. all those who lived within the territory of the ruler (and not only those who were related to him by blood) were bound to obey his commands

By way of criticism it is sufficient to say that while force has been one element in the formation of the State, it is wrong to say that it is the sole factor As is shown below,<sup>1</sup> the State is the result of the action of various causes—kinship, religion, force and political consciousness

## §9 THE PATRIARCHAL THEORY

This theory has its strongest supporter in Sir Henry Maine (1822-88) who stated it in his books *Ancient Law* (1861) and *Early History of Institutions* (1875) Maine derives his evidence from three sources—from accounts by contemporary observers of civilizations less advanced than their own, from the records which particular races (e.g. the Greeks) have kept of their own history, and from ancient law (e.g. Roman and Hindu)

The theory is as follows —The unit of primitive society was the family, in which descent was traced through males and in which the eldest male parent was absolutely supreme His power extended to life and death, and was as unqualified over his children and their houses as over his slaves The single family breaks up into more families, which, all held together under the head of the first family (the chief or 'patriarch'), becomes the tribe An aggregation of tribes makes the State

'The elementary group is the Family, connected by common subjection to the highest male ascendant The aggregation of Families forms the *gens* or House The aggregation of Houses

<sup>1</sup> §11 of this chapter

makes the Tribe. The aggregation of Tribes constitutes the Commonwealth<sup>1</sup>

Briefly, the State is an extension of the family, the head of the State being the father, the people, his children. Maine cites the Patriarchs of the Old Testament, the 'Brotherhoods' of Athens, the *patria potestas* in Rome and the family system in India as evidence in favour of his theory

It must be emphasized that the patriarchal society which, according to this theory, was the foundation of the modern State was characterized by three features, viz male kinship, permanent marriage and paternal authority<sup>2</sup> It is indeed integral to this theory that members of the patriarchal family should be able to trace their descent through the male 'Men are counted of kin because they are descended from the same male ancestor' (Sometimes no doubt this relationship was fictitious rather than real, as when in the absence of heirs the deficiency was made good by adoption) This in turn means that the system of permanent marriage, i.e. the permanent union of a woman with one man, had come to stay as a social institution. But, as Jenks points out, it must not be assumed that marriage as we understand it—the permanent union of one man with one woman—was a feature of all patriarchal society. On the other hand, polygamy, i.e. the marriage of one man to several women, was quite common. It need not be added, however, that polygamy is no hindrance to the recognition of kinship through the male. Paternal authority means that the male ancestor had well-nigh despotic authority over the group. Thus in early Rome the *patria potestas* (literally the authority of the father) 'extended to all the descendants of a living ancestor, no matter how old they were' and comprised 'even the power of life and death to say nothing of control and chastisement'

The defect of the theory is that we cannot say that the patriarchal society has been the foundation of later institutions everywhere, or that it has been necessarily the oldest form of social organization. For other evidence<sup>3</sup> suggests that in some societies the patriarchal family was a later development from the matriar-

<sup>1</sup> H. S. Maine, *Ancient Law*, 'World's Classics' edition, p. 106

<sup>2</sup> E. Jenks, *op cit*, pp. 15-17

<sup>3</sup> See below, §10 of this chapter

chal system, in which descent could be traced only through the female on account of the existence of polyandry.

The theory has the merit, however, that as an explanation of the origin of the State it emphasizes one essential element in the making of the State, viz kinship

#### §10 THE MATRIARCHAL THEORY

Among the chief exponents of this theory are McLennan (*Primitive Society*, 1865), Morgan (*Studies in Ancient Society*, 1877) and Jenks (*A History of Politics*, 1900) As distinguished from the patriarchal theory, this theory holds that the primitive group had no common male head, and that kinship among them could be traced only through the woman Thus, Jenks says,<sup>1</sup> illustrating his proposition from primitive society in Australia.

‘The real social unit of the Australians is not the “tribe”, but the *totem group*. . The totem group is, primarily, a body of persons, distinguished by the sign of some natural object, such as an animal or tree, who may not intermarry with one another . . The Australian may not marry within his totem “Snake may not marry snake Emu may not marry emu” That is the first rule of savage social organization Of its *origin* we have no knowledge, but there can be little doubt that its *object* was to prevent the marriage of near relations The other side of the rule is equally startling The savage may not marry within his totem, but he must marry into another totem specially fixed for him More than this, he not only marries into the specified totem, but he marries the whole of the women of that totem in his own generation’

Under such a system, it is obvious that as far as there is any recognition of blood-relationship at all, it is through women, and not through men ‘Maternity is a fact, paternity an opinion’ Jenks holds that society organized on such a basis gradually evolved into the family marked by paternal descent (of Maine’s description) It is unnecessary to elaborate the stages in this evolution Briefly they are men began to take to pastoral occupations, they domesticated animals, they recognized the value of women’s labour in tending sheep and cattle, and so gradually realized the value of permanently retaining women at home for the purpose, and thus arose the institution of permanent marriage ‘The tribe, instead of the family, is the primary

<sup>1</sup> op cit, p 9

group, in time it breaks into clans, these turn into households, and ultimately into individual members.'

The matriarchal theory is subject to the same criticism as the patriarchal. it is incorrect to regard matriarchal society as the oldest form of social organization everywhere. The truth seems to be that 'there has been a parallel development, but the patriarchal line is thicker and longer'<sup>1</sup>

## §11 THE EVOLUTIONARY THEORY

The theories discussed must, for reasons already stated, be rejected as unsatisfactory. The generally accepted theory is known as the historical or evolutionary theory. It considers the State neither as a divine institution nor as a deliberate human contrivance, it sees the State coming into existence as the result of natural evolution.

'The proposition that the State is a product of history,' says J. W. Burgess, 'means that it is a gradual and continuous development of human society out of a grossly imperfect beginning through crude but improving forms of manifestation towards a perfect and universal organization of mankind.'

The beginnings of government cannot be traced to a particular time or cause, it is the result of various factors, working through ages. These influences are kinship, religion, war and political consciousness.

In early society, kinship was the first and strongest bond, and government, as W. Wilson points out, must have begun in clearly defined family discipline. Such discipline would scarcely be possible among races in which blood-relationship was subject to profound confusion and in which family organization, therefore, had no clear basis of authority on which to rest. In every case, it would seem, the origin of what we should deem worthy of the name of government must have awaited the development of some such definite family as that in which the father was known, and known as ruler. Whether or not the patriarchal family was the first form of the family, it must have furnished the first adequate form of government.

Common worship was undoubtedly another element in the welding together of families and tribes. This worship evolved from primitive animism to ancestor-worship. When ancestor-

<sup>1</sup> M. Ruthnaswamy, *The Making of the State*, p. 18

worship became the prevailing form of religion, religion was inseparably linked with kinship, for at the family or communal altar, the worshipper did homage to the great dead of his family or group and craved protection and guidance. In some tribes we find that the medicine-man or magician, who naturally held a predominant position, acquired or was elevated to the position of kingship. The primitive man had implicit faith in the existence of spirits, the spirits of the dead and the spirits of nature. The medicine-man, professing ability to control them by means of his sorcery, naturally came to be regarded with mysterious awe and acquired unique influence. The founder of the Mexican power, we are told, was a great wizard and sorcerer.

War and migration, we have already seen, were important influences in the origin of the State. The demands of constant warfare often led to the rise of permanent headship. When a tribe was threatened by danger or involved in war, it was driven by necessity to appoint a leader. The continuity of war conducted to the permanence of leadership. Further, war and conquest helped to give the mark of territoriality to the State. In the patriarchal society or tribe, the nexus had been that of blood; but when a leader established his authority over a territory by conquest, over a people with whom he had no blood-relationship, all those who lived in that territory became his subjects. Blood was no longer the essential bond of unity.

And, finally, political consciousness. As Wilson says, in origin government was spontaneous, natural, twin-born with man and the family, Aristotle was simply stating a fact when he said 'man is by nature a political animal'. The need for order and security is an ever-present factor, man knows instinctively that he can develop the best of which he is capable only by some form of political organization. At the beginning, it might well be that the political consciousness was really political unconsciousness, but 'just as the forces of nature operated long before the discovery of the law of gravitation, political organization really rested on the community of minds, unconscious, dimly conscious, or fully conscious of certain moral ends present throughout the whole course of development.'

## §12 EARLY KINGSHIP AND PRIESTHOOD

It hardly needs to be reiterated that kingship was the earliest



form of government Early kings were also priests The connexion between kingship and priesthood may be illustrated both from Greece and Rome In Greece it was held that just as the domestic hearth had a high priest in the father of the family, the city religion should also have a high priest This priest of the public hearth bore the name of king He kept up the fire, offered the sacrifice, pronounced the prayer and presided at the religious repasts The principal office of a king, says de Coulanges, was to perform religious ceremonies An ancient king of Sicyon was deposed because, having soiled his hands by a murder, he was no longer in a fit condition to offer the sacrifices Being no longer fit to be a priest, he could no longer be king We know from Demosthenes that the ancient kings of Attica themselves performed all the sacrifices that were prescribed by the religion of the city, and from Xenophon, that the kings of Sparta were the chiefs of the Lacedaemonian religion The Roman king was similarly the guardian of the city hearth and high priest of its religion, as high priest, he represented the community in their dealings with the gods, appointed and controlled members of the religious colleges and punished offences against the gods As the king was the supreme chief of the religion, and the safety of the city was to depend upon his prayers and sacrifices, it was important to make sure that the king was acceptable to the gods. So kings entered upon their office after a religious ceremonial, and after a flash of lightning or a flight of birds had manifested the approval of the gods Even today, the Japanese Emperor is the high priest of the national cult of Shinto

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### CHAPTER III

## THE PURPOSE OF THE STATE

#### §1 DIVERGENT VIEWS

What is the purpose of political organization? There are perhaps as many answers to this question as there are writers on Politics. We shall cite a few, beginning with Aristotle.

To understand Aristotle's thought on the subject, we must start with his proposition that man is by nature a political animal. This means, first, that the social instinct is implanted in all men by nature, and that man can rise to his full stature only through the State. The State, Aristotle tells us, which originates for the sake of life, continues 'for the sake of the best life'. The end of the State is, therefore, ethical. As Newman puts it, the State exists (according to Aristotle) for the sake of that kind of life which is the end of man—not for the increase of its population or wealth or for empire or the extension of its influence. It exists for the exercise of the qualities which make men good husbands, fathers and heads of households, good soldiers and citizens, good men of science and philosophers. When the State by its education and laws, written and unwritten, succeeds in evoking and maintaining in vigorous activity a life rich in noble aims and deeds, then and not till then has it fully attained the end for which it exists. The ideal State is that which adds to adequate material advantages the noblest gifts of intellect and character and the will to live for their exercise in every relation of life, and whose education, institutions and laws are such as to develop these gifts and to call them into play. We may add that good life is life lived according to reason, 'the function of reason in ethics consists in the direction of conduct by a rule, the rule, namely, of the mean', in politics, reason prescribes co-operation with one's fellow citizens in promoting the welfare of the State.<sup>1</sup>

<sup>1</sup> The ethical end of the State was well recognized by thinkers in Ancient India. The *Mahabharata* thus says that the State should ceaselessly foster righteousness, guide, correct and control the moral life of the people, besides making the earth habitable and comfortable for them. See Beni Prasad, *The State in Ancient India*, p. 98.

The ethical end of the State is subordinated to convenience in Locke. His 'concern is not with the 'good' but with the 'convenient' 'The great and chief end of men uniting into commonwealths and putting themselves under government is the preservation of their property'—which is Locke's general name for 'lives, liberties and estates' In the state of nature, these are not safe owing to the want of a settled known law, a known and indifferent judge, and 'a common Executive. The better preservation of these natural rights is therefore the purpose of political society, the exercise of power by a government is conditioned by that purpose. Locke, it will be remembered, does not make his natural man surrender his natural rights even to the community, only the right of enforcing the law of reason is given up. The end of the State, as defined by Locke, is intelligible when it is remembered that the 'provocation' for his *Two Treatises of Civil Government* was the arbitrary exercise of power by the Stuart kings, and that its aim was to justify the principles of the Bill of Rights and the 'Glorious' Revolution of 1688.

Adam Smith (1723-90) in his *Wealth of Nations* (1776)<sup>1</sup> laid down the following proposition —The sovereign has only three duties to attend to —the duty of protecting society from the violence and invasion of other independent societies, secondly, the duty of protecting, as far as possible, every member of society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice, and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain, because the profit yielded would never repay the expense to any individual or small number of individuals, though it might frequently do much more than repay a great society.

The process of the narrowing down of the purpose of the State reaches its culmination in Herbert Spencer (1820-1903). According to him, the State is nothing but a natural institution for preventing one man from infringing upon the rights of another, it is a joint stock protection company for mutual assurance.

<sup>1</sup> 'Everyman's Library' edition, Vol II, pp 272-3

## §2] 'THE STATE IS AN END IN ITSELF'

### §2 'THE STATE IS AN END IN ITSELF'

Locke, Adam Smith and Spencer agree that the State is a means to an end, the end being a better life for the individual, whether conceived in ethical terms or not, whether the State is to interfere more or less. The opposite view that the State is an end in itself has had its exponents too, and is perhaps best illustrated by the school of thinkers known as Idealists, especially by Hegel. Hegel's argument is somewhat as follows —Men want to be free, they are free only when they do what their reason recommends. Individual reason is not, however, trustworthy, because it is particularistic and moved by temporary and irrelevant considerations. The existence of some entity, whose will is universal and as acceptable to individuals as the voice of reason itself, is necessary. Such an entity is the State. It is a person and has a will of its own. It has ends of its own divorced from, and superior to, those of the individual human beings subjected to its authority. It carries out the dictates of universal reason and is therefore impelled by its own nature and destiny to seek its own perfection. 'The State, being an end in itself, is provided with the maximum of rights over against the individual citizens, whose highest duty it is to be members of the State.'<sup>1</sup> True freedom, therefore, consists in conformity to law, every law is a veritable freedom. The same trend of thought is illustrated in fascism and nazism. Thus

'The Italian nation is an organization having ends, a life and means superior in power and duration to the single individuals or groups of individuals composing it.'<sup>2</sup>

It is noteworthy that those who claim that the State is an end in itself also take their stand on the idea that the individual is fleeting, the State is everlasting, the leaves wither, the tree stands. Says the fascist

'Society is an imperishable organism, whose life extends beyond that of the individuals who are its transitory elements. These are born, grow up, die and are substituted by others, while the social unit always retains its identity and its patrimony of ideas and sentiments, which each generation receives from the past and transmits to the future.'

The individual cannot therefore be considered as the ultimate

<sup>1</sup> *The Philosophy of Law* (1821)

<sup>2</sup> Article 1 of the Italian Labour Charter, 21 April 1927

end of society Society has its own purposes of preservation, expansion and perfection, and these are distinct from, and superior to, the purposes of the individuals who at any moment compose it. In the carrying out of its own proper ends, society must make use of individuals ; the individual must subordinate his own ends to those of the society.

It sounds grandiose to say that the State has ' ends superior to those of the single individuals composing it '. But what are those ends ? Why should the individual subordinate his own ends to those of the State ? No conclusive answer has been given. Answers involving words and phrases like ' universal reason ', ' spirit ', ' idea ', ' real will ' are only evasions of the issue. One suspects that these phrases are only meant to justify the acquisition of power and prestige for the State, i.e. for the glory of the ruler, and to commend to the ruled the sacrifice which this necessarily involves for them. The theory is but one way of justifying absolutism. It is founded on assumptions which are contrary to human experience.

' It regards humanity as something more than men,' writes R. M. MacIver,<sup>1</sup> ' nationality as something more than the members of a nation. It suggests that it is possible to work for humanity otherwise than by working for men, to serve nationality otherwise than by serving the members of a nation. In so far as the end and value of society are regarded as other than the ends and values of its members taken as a whole, the latter count for less than before. Not only can we not give meaning and concreteness to such a value, but the postulation of it deprives of actuality the values we actually know '.

No. The formula laid down by Kant is as true now as when it was laid down. The individual is the end and cannot be considered as a means to an end. The State may rightly be considered only as a means to the enrichment of individual personality.

### §3 THE GREATEST HAPPINESS OF THE GREATEST NUMBER

An answer, more satisfactory than most of the answers given above, has been provided by the Utilitarian school, of which Jeremy Bentham (1748-1832) and John Stuart Mill (1806-73) are the best-known exponents. Briefly, their point of view is this :—All men desire happiness, which may be defined as the surplus of

<sup>1</sup> *Philosophical Review*, September 1915

### §3] THE HAPPINESS OF THE GREATEST NUMBER

pleasure over pain. Pleasure and pain are therefore the main springs of human action.

‘Nature has placed man under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do . . . We owe to them all our ideas, we refer to them all our judgements, and all the determinations of our life’ (Bentham)

The sources of pleasure and pain are physical (e.g. good scenery), political (e.g. good laws), moral (public opinion) and religious (relations with God). It is the task of the legislator to manipulate these ‘sanctions’ to promote human happiness, individual and social. In the calculus of happiness, everybody is to count as one and nobody for more than one. To the individual the value of a pleasure or pain taken by itself depends on a number of factors including its duration, intensity, certainty (or uncertainty) and nearness (or remoteness). In dealing with a group the number of persons affected is another factor. So it is a matter for hedonistic<sup>1</sup> calculus, summing up pleasures and pains in any particular case and balancing the pleasures against the pains, considering the number of persons affected and seeing whether the law contemplated produces the greatest happiness of the greatest number.

Utilitarianism has been subjected to a number of criticisms. It assumes that the business aspect of human affairs alone governs man’s conduct, it does not seem to appreciate pure disinterestedness, which it ultimately resolves into the pursuit of individual pleasure. Again, a sum of pleasures may be an attractive phrase; but when it comes to estimates of human happiness or misery, arithmetic in politics is not much more helpful than politics in arithmetic, for there is no proof that by pursuing the happiness of the greatest number, we shall produce, or help to produce, the greatest happiness. If men were all equal, it would be simple political philosophy, because it is nothing more than simple arithmetic, to conclude that the greater the number of men made happy, the greater the resulting sum of happiness. But men are not equal, Bentham himself admitted that the dogma of the equality of men was an ‘anarchic fallacy’. As men are not equal, and the same pleasure may be felt by different men unequally,

<sup>1</sup> Hedonism is the doctrine or theory of ethics in which pleasure is regarded as the chief good or the proper end of action.

it would be difficult to calculate the greatest happiness of the greatest number, with any assurance of success.

But in spite of all this criticism, the formula of the greatest happiness of the greatest number still remains valuable in Politics. It supplies a 'slogan' which gets imprinted in the popular mind and supplies a standard, a touchstone, with which one can judge State actions. The basic idea of Utilitarianism (distinguished specially from Idealism) is simply this: all actions must be judged by their results, by their fruitfulness in pleasure, and this pleasure must find actual expression in the lives and in the experience of definite individuals. And above all, to use Pollock's metaphor, the formula of the greatest happiness can be made a hook to put in the nostrils of the leviathan [the State], that he may be tamed and harnessed to the chariot of utility. The criterion of utility serves to simplify the problem of Politics. Bentham said, 'let the State act to remove disabilities'; in so doing the rulers would be forwarding the welfare of their subjects. But if the authorities failed in this purpose, they could claim no rights of sanctity. The claims of legality could not stand for a moment against the claims of morality, and the claims of morality were summed up in the happiness of the people.

'A public judgement of happiness, expediency, well-being, or whatever else we call it, is in the nature of human affairs a rough thing at best, and there is plenty of work to be done which ought to be done on any possible view of the nature of duty. The main point was to rouse the State to consciousness of its power and its proper business, and by persistent and confident iteration, Bentham did this effectually.'<sup>1</sup>

#### §4 A MODERN VIEW

One of the best statements in recent times regarding the purpose of the State is made by Laski in his *A Grammar of Politics*. The State is an organization to enable the mass of men to realize social good on the largest possible scale. It exists to enable men, at least potentially, to realize the best that is in themselves. Men can be enabled to realize the 'best that is in themselves' only if the State provides 'rights'. Rights are those conditions of social life without which no man can seek in general to be himself at his best. They have a content which

<sup>1</sup> F. Pollock, *An Introduction to the History of the Science of Politics*, p. 108

changes with time and place. They are prior to the State in the sense that, recognized or no, they are that from which its validity derives. Rights are, therefore, the groundwork of the State.

To illustrate: the citizen has a right to work. Society owes the citizen the occasion to perform his function, for to leave him without access to the means of existence is to deprive him of that which makes possible the realization of personality. The right to work involves the right to maintenance in the absence of work. The right to an adequate wage, the right to reasonable hours of labour, and the right to be concerned in the government of industry, are other economic rights which are necessary to provide decent conditions of life and work. The citizen has a right to such education as will fit him for the tasks of citizenship.

A group of other rights are necessary to enable the citizen to have a share in the government of his State, itself a necessary condition for the realization of his best self: the right to vote, periodical elections, the right to stand as a candidate for election, equal eligibility to government office (if the necessary qualifications are fulfilled), and freedom of speech, press and association. They enable the citizen to contribute his instructed judgement for the public good, to elect his rulers and call them to account for their conduct in office. They enable him, too, to work with like-minded men for the promotion of those purposes in life which he deems necessary for realizing his own personality.

And, finally, a third group of rights which Laski calls *Private* is essential. Under this head he includes the right to reasonable access to judicial remedy, freedom of religion and a limited right of property. These are necessary to give the citizen a sense of personal security and freedom of conscience.

These rights, it is hardly necessary to mention, are not absolute rights: the rights of one are limited by the rights of others. They have also to be defined in detail from time to time in relation to social conditions. Moreover, while it is true that the State must give the citizen these conditions, without which he cannot be that best self that he may be, this does not mean the guarantee that his best self will be attained. It means only that the hindrances to its attainment are removed as far as the actions of the State can remove them. But the State must do its duty; since it exists to enable men to realize their best, it is only by maintaining rights that its end may be attained.



Laski, it ought to be added, is careful to point out that his way of stating the purpose of the State is only a special adaptation of the Benthamite theory to the special needs of our time. It follows Bentham in its insistence that 'social good is the product of co-ordinated intelligence', and that social good means the avoidance of misery and the attainment of happiness. It differs from the Utilitarian outlook in its rejection of the egoistic nature of the human impulse and of the elaborate calculus of pains and pleasures.

'Our view', concludes H. J. Laski, 'is rather, first, that individual good cannot, over a long period, be usefully abstracted from the good of other men, and, second, that the value of reason is to be found in the degree to which it makes possible the future, not less than the immediate, harmony of impulses.'

The view outlined above has the great merit of being simple, realistic, and intelligible. It is broader than the views of Locke and Spencer. It is clearer and safer than the Idealist view, clearer because it does not take shelter behind big phrases like 'cosmic reason' and 'the personality of the State', and safer because it leaves the judgement of the performance of the State to the average man and woman who are subject to its laws. It is not static, but takes note of changes in time and place. Above all, it makes the individual the end, and the State the means. It puts the State on trial, for, over any long period, the State can win the allegiance of its citizens only by the efforts it makes to give their rights increasing substance.

## §5 POLITICAL OBLIGATION

If now we ask ourselves the question 'Why do men obey the State?' the answer is clear. In rational terms, men obey the State because they stand to gain by doing so. They are conscious that the State has a rational purpose, that purpose is the promotion of social good on the largest possible scale, the achievement of that purpose demands their willing co-operation and obedience to laws. But the same view also tells them that, in certain circumstances, they may deem it their duty to withdraw their co-operation and resist the State, viz. when the mischiefs of obedience are greater than the mischiefs of disobedience. They obey the State because, by doing so, they hope to be provided with those conditions of social life which are

necessary for the realization of their own personalities ; it is the duty of the State to recognize their rights and give them increasing substance. When there is clear evidence that, over a reasonable period, the State is not doing its duty, in other words, when its actions are not in accordance with its purpose, the individual has a duty to ask himself why he should continue to render obedience. There is a moral right to resist.

The right to resist the State, however, is itself limited by conditions, as indeed all rights are. First, the individual must not resist the State if reasonable grounds exist to show that it is seeking to play its part, even though it has not achieved its object as quickly as he might wish. Second, he must have reasonable ground for the belief that the changes he advocates are likely to result in the end he has in view. Third, he must try constitutional methods of agitation before resorting to resistance, for, very often, by themselves they may be sufficient to gain the objective. Further, resistance can be resorted to only for the vindication of significant issues, as distinguished from minor details of no moment. The gist of these limitations is that, as Burke said, the right to resist is the medicine of the constitution and not its daily bread. This is a necessary caution because, while the conscientious individual who leads the resistance may often be motivated by the highest moral purpose, he must remember that he may be followed by others less conscientious who may take advantage of the opportunity to gain their selfish ends.

This is purely a rational view of the problem of political obligation, and, therefore, inadequate. Graham Wallas has taught us that the play of reason in politics is restricted by the strength of emotions and instincts in the mental life. As Laski suggests, the State as it was and is has found the roots of allegiance in all the complex facts of human nature. This nature is a mixture of impulses and reason. The satisfaction of man's primary wants—hunger, drink, sex, clothing and shelter—involves associated life, and associated life implies the necessity of government.

'The activities of a civilized community are too complex and too manifold to be left to the blind regulation of impulse, and even if each man could be relied upon to act consistently in terms of intelligence, there would be need for a customary standard by which the society in its organized form agreed to differentiate right from wrong.'

Some obey through fear of the punishments which disobedience to law involves. Further, men are born in the State, obedience to the State becomes with most men a habit, and few expend the effort to scrutinize its foundations. And those who reflect on the nature of the State would find it an organization to enable the mass of men to realize social good—an instrument to further men's happiness, and would render obedience to it to the extent it realizes its purpose.

To enable the State to fulfil its purpose, it is endowed with force, with coercive power. But force is not the essence of the State but only its criterion. The Government, as the agency of the State, is vested with coercive power in order to compel obedience to its laws for the preservation of order and for the common good of the community. The purpose of force is to prevent individuals and associations of individuals from taking the law into their own hands and to insist on a peaceful settlement of their differences. As A. D. Lindsay puts it, most people usually wish to obey the law. Everybody has to obey it always. The force of the State is necessary to fill up the margin between 'most people' and 'everybody', between 'usually' and 'always'. But force, essential as it is, is not the *basis* of the State. It is assigned to the Government as upholders of law; and the law itself must be such as to command the general consent of the people. This point is well brought out in Green's famous statement: 'Will, not force, is the basis of the State'.<sup>1</sup>

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<sup>1</sup> See p. 63 below, for a further explanation of this statement.

## CHAPTER IV

# SOVEREIGNTY

### §1 THE THEORY OF SOVEREIGNTY

Sovereignty<sup>1</sup> may be defined as the power of the State to make law and enforce the law with all the coercive power it cares to employ. It is

‘that characteristic of the State in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself’<sup>2</sup>

The modern State claims to be sovereign, to be subject to no higher human authority

The conception of sovereignty was introduced into political theory by the French writer Bodin (1530-96) Defining the State as an aggregation of families and their common possessions ruled by a sovereign power and by reason, he said that in every independent community governed by law there must be some authority, whether residing in one person or several, whereby the laws themselves are established and from which they proceed And this power being the source of law must be above the law—though not above duty and moral responsibility Sovereignty is a power supreme over citizens and subjects, itself not bound by the laws Bodin did not carry his theory to its logical conclusion, suggested by the preceding summary, because he admitted (i) that there were some fundamental laws (e.g. the Salic law of France) which the sovereign could not lawfully abrogate, and (ii) that private property being granted by the law of nature and, therefore, inviolable, the sovereign could not tax the subjects without their consent

Among other writers who developed the theory may be mentioned Grotius (1583-1645), Hobbes, Locke, Rousseau and Ben-tham The importance of Grotius in the development of the theory is that he emphasizes *external* sovereignty, i.e. the inde-

<sup>1</sup> The word ‘sovereignty’ is derived from the Latin word *superanus* and means ‘supreme’

<sup>2</sup> *Lehre von den Staatenverbindungen*, p. 34, cited by J. W. Garner in his *Introduction to Political Science*, p. 239

pendence of States from foreign control Hobbes, as we have seen, made sovereignty absolute and located it in the ruler, basing his theory on a social contract Locke did not use the term sovereignty at all, in so far as there was a supreme power in his State, it lay with the people, but normally it was latent Rousseau maintained that sovereignty belonged to the people, it could be exercised only in an assembly of the whole people Government was but the executive agent of the general will; it had no manner of sovereignty The sovereignty of the people in Rousseau was as unlimited as that of the Government in Hobbes Bentham agrees that sovereignty is unlimited by law, but it is not morally unlimited, for, in practice, it is limited by the possibility of resistance, and there are conditions under which resistance is morally justifiable He urged the necessity for the sovereign to justify his power by useful legislation with the object of promoting the greatest happiness of the greatest number

## §2 AUSTIN'S VIEW

The most familiar statement of the doctrine of sovereignty is a passage by Austin (1790-1859) in his *Province of Jurisprudence Determined* (1832)

(If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and that society (including the superior) is a society political and independent) 'Furthermore', he continued, 'every positive law, or every law simply and strictly so-called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme'

The implications of this, the analytical view of sovereignty and law, are threefold (i) in every State, there must be a sovereign and the sovereign's power is unlimited and indivisible, (ii) the sovereign must be clearly located, and (iii) his commands are laws, a law being defined as a command of the State obliging the subject to do, or to refrain from doing, certain acts, failure to obey being visited by a penalty A legal right, according to this view, is a privilege or exemption enjoyed by a citizen as against any of his fellow-citizens, granted by the sovereign power of the State and upheld by that power, e.g. the right of property. The subject has no legal rights against the State

## §3] IS SOVEREIGNTY ABSOLUTE?

Each one of these implications is subject to criticism

## §3 IS SOVEREIGNTY ABSOLUTE AND INDIVISIBLE?

Critics like Laski argue that it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered. The essence of this criticism is a realistic view of the State, as contrasted with the formal and legalistic view of Austin. The State is a useful instrument for promoting social good. It follows that its laws must be obeyed when they are designed to promote that end. It is senseless, however, to urge that the sovereign power of the State must or will be obeyed when the State's acts have no relation to its purpose. Man has a sense of right and wrong.

'Legally an autocratic Tsar may shoot down his subjects before the Winter Palace at Petrograd, but morally it is condemnation that we utter. There is, therefore, a vast difference between what Dean Pound has admirably called "law in books" and "law in action"'

It is with the latter that a realistic theory of the State is concerned.

The power which the State can command is never absolute, for, (i) in every society there are principles or maxims expressly adopted or tacitly accepted, which the sovereign should habitually observe.

(ii) In a democratic State, the legal sovereign should bow to the political sovereign.<sup>1</sup> The legal sovereign is that person or body of persons having the power to make law. The political sovereign is that body of persons in the State (the electorate) whose will ultimately prevails because the legal sovereign in making the law is bound to act according to their will. It is possible to find fault with Dicey's analysis, for his attempt to find the *final sovereign* may be a difficult adventure. As John Chipman Gray said, the real rulers of a society are undiscoverable. In France and Switzerland only men have the right to vote, but is their vote uninfluenced by women? In this case, the political sovereign of Dicey may be shifted further, indeed may not be easily definable.

Further, the conception of a political sovereign as the ultimate sovereign has the defect that the will of the electorate may not be

<sup>1</sup> A. V. Dicey, *Law of the Constitution*, 9th ed., pp. 72-3

adequately carried out by the legal sovereign, and, where, as in Britain and India, the electorate have no power directly to make or annul laws (through the methods of the referendum and the initiative<sup>1</sup>), the final sovereignty may be partly shared by the legal sovereign

Yet Dicey's criticism is valuable in the sense that normally the lawmaking authority must respect public opinion.

(iii) Sir Henry Maine urges that Austin's conception of sovereignty is inapplicable to undeveloped communities where custom is a powerful force. The instance which Maine gives<sup>2</sup> in support of his contention is telling. There could be no more perfect embodiment of sovereignty, as conceived by Austin, than Ranjit Singh (king of the Sikhs, 1801-39). He was absolutely despotic. 'Yet I doubt whether once in all his life, he issued a command which Austin would call a law.' The rules which regulated the life of his subjects were derived from their immemorial usages, administered by domestic tribunals in families or village communities. It might be contended that, as the Sikh despot permitted heads of households and village elders to prescribe rules, these rules were his commands and true laws, on the principle that 'what the sovereign permits, he commands'. But if 'Ranjit Singh never did or could have dreamed of changing the civil rules under which his subjects lived', the case is different. He could not but permit what he commanded!

(iv) The State is but one association among several associations, say the pluralists (e.g. Laski, Cole, etc), and, therefore, it cannot be invested with the unique sovereign power of the community. Indeed, there must be as many sovereigns as there are associations (e.g. the Church, the Federation of Trade Unions, Employers' Associations). The State must limit its activities to those which concern all people alike, e.g. the maintenance of law and order. In matters which concern lesser groups, the State has no business to interfere. R. M. MacIver's definition of the State illustrates this view.

'The State is an *association* which, acting through law as promulgated by a government endowed to this end with coercive power, maintains within a community territorially demarcated the *universal* external conditions of social order.'<sup>3</sup>

<sup>1</sup> See below, ch XXVII, §8

<sup>2</sup> *Early History of Institutions*, pp 380-2

<sup>3</sup> *The Modern State*, p 22 Italics ours

The traditional or monistic theory of sovereignty, says the pluralist, errs in holding that the various non-political associations are created by the State, are dependent for their continued existence upon the will of the State, and exercise only such powers as are conceded to them by the State. It is urged, on the contrary, that associations grow naturally, that they have a will of their own and possess personality and that the life lived in the group is a very important part in the life of the individual. Thus a trade union comes into existence not because the State creates it, but because the workers feel that by uniting themselves into an association they are able to secure better wages and other favourable conditions of work, which individually they are unable to secure. Further, the trade union as a body has a will and a policy which may fairly be distinguished from the will and the policy of its individual members. The pluralist contention is that voluntary associations should not be dictated to by the State.

(The majority of a nation is not competent to act for the interests of all in all things, because the interests of the members of a nation are not common in all things. Therefore, besides a national sovereign deciding questions in cases affecting the common interest of the entire nation, there should be particular sovereigns to decide matters, where the special interest of some group is more important than the remoter interest of the majority.)

There are differences among the pluralists, some holding that the State is only *unus inter pares* (one among equals), and therefore, must have no control at all over other associations, others, that it is *primus inter pares* (the most important among equals), and, therefore, may be vested with the power of co-ordination between associations, and between associations and the State, into these details, we do not enter. The pluralists have rendered a distinct service in that they have shown the danger of attributing absolute sovereignty to the State and the value of allowing initiative to groups; their error, briefly, is that they are not content to supplement but attempt to supplant the State.

(v) Is sovereignty indivisible? This question has been particularly raised by American writers on Government, because it has special reference to the type of State to which the United States of America belongs, viz a federation. The essential characteristic of a federal State, as is shown below,<sup>1</sup> is the division of

<sup>1</sup> See below, ch XXIV



governmental powers between the common Central Government and the governments of the units which constitute the federation Hamilton and Madison, therefore, argued<sup>1</sup> that the sovereignty is divided between the States on the one hand and the federal union on the other, so that 'the whole sovereignty consists of a number of partial sovereignties' On the other hand, Calhoun argued<sup>2</sup> that sovereignty is an entire thing, to divide it is to destroy it It is the supreme power in a State, and 'we might just as well speak of half a square or half a triangle as of half a sovereignty' The question is not of mere academic interest, because once admit the divisibility of sovereignty and the units in a federation will claim the freedom to secede of their own will from the federation It is unnecessary to follow the controversy further, so far as America is concerned, the issue was decided in favour of the indivisibility of sovereignty by the American Civil War (1861-5). It is now settled doctrine that, legally, sovereignty in a federal State is vested in the amending body of the constitution While governmental powers are divided between two governmental authorities, sovereignty itself is not divided, it is vested in that body which can change the constitution or fundamental law—which in Austinian terms can be said to obey no like superior but receives habitual obedience from the bulk of a given society

#### §4 CAN SOVEREIGNTY BE LOCATED?

The Austinian theory says that the sovereign is a determinate person or body of persons, but it may be doubted whether this is so in every State In Britain, no doubt, the sovereignty is clearly located in the King in Parliament A bill passed by both Houses of Parliament and assented to by the king becomes the law of the land and is put into effect by the courts The king in Parliament is also the sovereign of India But in other States the sovereign is not so determinate For instance, in the United States of America the sovereign, as noticed earlier, is the body which has power to amend the constitution But to call this body determinate is an abuse of language The United States is a federal State consisting of forty-eight 'states' The powers of government are divided between the Central Government and the state governments this division is effected by a constitution

<sup>1</sup> *The Federalist* (Everyman's Library), Essays 32 and 39

<sup>2</sup> *Disquisition on Government*, 1851

Both the centre and the units can act only in accordance with the terms of the constitution. This constitution can be amended in the following way

'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the Legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress'<sup>1</sup>

An analysis of this Article shows that there are four alternative methods of amending the constitution —First, the Congress by a two-thirds majority may propose an amendment and the Legislatures of three-fourths of the states may ratify it, second, a convention, called on the application of the Legislatures of two-thirds of the states, may propose an amendment and the Legislatures of three-fourths of the states may ratify it. Third, the Congress by a two-thirds majority may propose an amendment, and conventions in three-fourths of the states may ratify it, and finally, a convention called on the application of the Legislatures of two-thirds of the states may propose an amendment, and conventions in three-fourths of the states may ratify it. A body, which is now one, now another, can hardly be called determinate. Moreover, this body does not normally meet, it does not also pass ordinary laws. Truly does Laski consider the discovery of the sovereign in a federal State an 'impossible adventure'

The difficulty of locating the sovereign is not, says Laski, confined to a federal State. Taking the example of Belgium (a unitary State), he shows how it is difficult to locate the sovereign there. For the constitution of Belgium guarantees certain rights to individuals, such as freedom of religion. These rights are alterable by the Belgian Assembly.

'But before the constitution can be altered, the decision of one Assembly must be ratified by a new one, re-chosen by the electorate for that purpose. There is no guarantee not merely that the new chambers will in a sitting, at which two-thirds of the members are present and two-thirds of these vote for the change, ratify the constitutional alteration, even more, there is

<sup>1</sup> Article V

no guarantee that the new Assembly will have the same complexion as the old, and it might, as a matter of theory, prove impossible to alter the constitution. In that background either Belgium is not a sovereign State in its internal affairs or its sovereignty resides in the electorate'

But the electorate is not the legal sovereign, for it cannot pass laws

## §5 LAW AS COMMAND

The third line of criticism is that which directly challenges the claim that the State, or the sovereign within the State, makes law. It is argued that an adequate view of law should take into account the historical and sociological aspects of it as well. The essence of the historical approach to law, e.g. by Sir Henry Maine, may be expressed thus 'Law grows as the people grow, develops with the people. Law is the result of a varying, progressive, slow and lengthy formation by society rather than of the arbitrary will of a law-giver'. We may illustrate this position from one of the epoch-making laws in modern India. The ruler of Travancore decreed in 1936 that all classes of Hindus, irrespective of caste, could be admitted into the State temples. This decree broke a custom which has prevailed in Hindu society for centuries. It is by no means an adequate explanation of this law to say that the Ruler had the power to pass the law and he passed it. We must also take into account those influences which had been, for at least half a century, tending to mitigate the rigours of caste: the contact of India with Western culture and ways of living, and the opportunities which they provided for the freer contacts of men of all classes, schools and colleges, clubs, buses, trains, etc., urban life with its relative freedom from social conventions which prevail in rural areas, the influence of Christianity and Islam, the permeation of egalitarian ideas through the study of European political classics and the propaganda carried on against untouchability by Mahatma Gandhi and other farsighted leaders.

The sociological view is illustrated by Léon Duguit<sup>1</sup> and Hugo Krabbe. The obligations involved in law arise not from the fact that they are decreed by any sovereign, they arise from the conditions of social life. Duguit holds that social solidarity

<sup>1</sup> *Law in the Modern State*, 1921

constitutes the foundation of law. Stealing and assault are prohibited by law, if they were permitted, society would not hold together for long, its community of interests, feeling and action would cease to exist. Krabbe holds that law springs from men's sense of right. Their sense of right tells men that stealing and assault are wrong, and, therefore, should not be permitted. As explained below,<sup>1</sup> none of these three schools of law, taken by itself, is adequate, the generally accepted view is that the nature of law can be properly grasped only if the analytical, historical and sociological aspects are all taken into consideration. Therefore, the conception of the legal sovereign as the authority creating law is inadequate, as the content of law is never actually 'created'.

## §6 A HISTORICAL ANALYSIS

In a historical analysis of the State it may be urged that (i) the idea of the omnipotent State grew up in certain circumstances, internal and external, which no longer hold good, and that (ii) the State has not always been omnipotent.

(i) Duguit in an admirable analysis points out that internally the notion of State sovereignty grew up in the sixteenth century when, in the main, the State provided police, military and judicial services, then its acts appeared simply as unilateral commands. Today, as the result of a complex transformation, due partly to the progress of knowledge, and partly to economic and industrial changes, the business of government has gone beyond the provision of internal security, justice, and of defence against war. It helps industry and agriculture, provides public instruction and poor-relief, establishes insurance systems of various kinds—against unemployment, old age and sickness, and ensures transport. Briefly, the State has become the national housekeeper. Not command but service is the prominent characteristic of the State. The modern State is a social service State and, therefore, the idea of public service should replace the idea of sovereignty.

Externally, it is argued, the world has become more interdependent since the time when Bodin developed his theory of sovereignty, especially since the industrial Revolution. Thus

<sup>1</sup> See ch. V, §1

Britain and other European countries are much in need of Indian products—raw jute and cotton, tea, oilseeds, hides and skins, lac, etc. India, in turn, imports textiles, metals, machinery, vehicles, oils, paper and rubber. The full utilization of the world's resources demands co-operation among the nation States. But, as it is, the existence of sovereign States prevents the maximum of co-operation, besides, it leads to war and the destruction of civilization. Therefore, nations must agree to the principle that in matters which touch more than one nation, they will be bound by the decision arrived at by a common authority, such as a strengthened League of Nations, in which they will all be represented. Examples of such common matters are territorial boundaries, international migration, armaments, tariffs, the rights of national minorities, international communications and external capital. Some thinkers, like Clarence Streit, even advocate a federation of nations. The meaning of this proposal is that the external sovereignty claimed by States must be restricted in matters affecting all, so that collective security may be established. The theory of sovereignty developed in a self-sufficient age cannot be maintained in a world where the interdependence of States is so marked.

(12) In practice those who attempted to realize in their conduct the substance of sovereignty found themselves sooner or later deprived of it, witness, for instance, the French Revolution of 1789 and the Russian Revolution of 1917. Indeed, revolutions, in the expressive phrase of Laski, are footnotes to the problem of sovereignty.

#### §7 A MODIFIED VIEW

(The preceding discussion suggests that there are several valid criticisms against Austin's theory. it is not applicable to undeveloped communities, among whom custom is the king of men, it does not trace out the real, as distinguished from the formal, repository of political power, it ignores the power of public opinion, it wrongly attributes absolutism to the sovereign, it ignores the strength and freedom of voluntary associations, it forgets that the sovereign is not everywhere a determinate person or body of persons, it presents an inadequate conception of law, and, finally, its emphasis on external sovereignty is out of accord with modern conditions. The merit, however, of the theory is

that, as a conception of the legal nature of sovereignty, it is clean and logical ]

Is it true, then, to say that no theory of sovereignty has been evolved to fit in with all the facts? We may perhaps accept as final the view of T H Green<sup>1</sup> which is here summarized

In those levels of society in which obedience is habitually rendered by the bulk of society to some determinate superior who is independent of any other superior, the obedience is so rendered because this determinate superior is regarded as expressing or embodying what may properly be called the general will, and is virtually conditional upon the fact that the superior is so regarded. It is by no means an unlimited power of compulsion that the superior exercises, but dependent upon the sovereign conforming to certain convictions on the part of the subjects as to what is for the general interest. The sovereign is able to exercise the ultimate power of getting habitual obedience from the people in virtue of an assent on the part of the people. This assent is not reducible to the fear of the sovereign felt by each individual, rather it is a common desire to achieve certain purposes, towards which obedience to law contributes <sup>achieve certain purposes by obedience</sup>

The Austinians may therefore maintain that a determinate person or body of persons must have sovereign power. Let us only remind them that (i) the existence of such determinate sovereignty is true only of the thoroughly developed State, and (ii) that they should not suppose that the coercive power which the sovereign exercises is the real determinant of the habitual obedience to that power. That real determinant is the fact that people have a sense of common interests and a common sympathy and a desire for common objects which we call the general will, and which they believe is embodied in the sovereign. 'Will, not force, is the basis of the State'

they can't but

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## CHAPTER V

# LAW

### §1 NATURE OF LAW

We ordinarily use the term 'law' to mean a body of rules to guide human action<sup>1</sup> In any community, there will develop set and customary ways of carrying on social activities, which save time and avoid friction They form a sort of unwritten code, enforced by parental and religious authority or by the pressure of public opinion Some of these customs, however, may become so important for general welfare that stronger pressure than social authority or opinion must be brought to bear on those members of the community who act in violation of accepted social standards Whenever any community, acting through its Government, undertakes to apply such pressure by fixing a penalty for violation, then such customs cease to be purely social and become political They become the law of the land They are virtually commands, ordering or prohibiting certain actions, disobedience to which involves a penalty inflicted by the Government Law may be defined as follows

'That portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of government' (Wilson)

'The body of principles recognized or enforced by public and regular tribunals in the administration of justice' (Pound)

'The system of rights and obligations which the State enforces' (Green)

'The body of principles recognized and applied by the State in the administration of justice' (Salmond)

'The command of a sovereign, containing a common rule of

<sup>1</sup> 'Any kind of rule or canon whereby actions are framed' (Hooker, *Ecclesiastical Polity*) It may be added that this is its use in the social sciences In the physical sciences it is used in altogether a different sense, to indicate the abstract idea of the observed relations of natural phenomena, be those relations instances of causation or of mere succession and co-existence Thus when we talk of the laws of gravity, we mean merely that objects do gravitate, we are here using the term 'law' to convey to our minds the idea of order and method See T E Holland, *The Elements of Jurisprudence*, pp 17-18



life for his subjects, and obliging them to obedience' (John Erskine)

The modern theory of law has been the result of three principal lines of thought the analytical, the historical and sociological

(i) *The analytical school* The two essential features of law according to the writers of this school (e.g. Austin) are (a) Law is something made consciously by lawgivers, whether legislative or judicial. A law is law because it is set by a sovereign political authority. (b) Force is of the essence of law, nothing that lacks an enforcing agency is law. 'The most obvious characteristic of law is that it is coercive' (Holland). Machiavelli (*The Prince*, 1513) and Bodin (*The Republic*, 1576) held this view. Hobbes' definition of law clearly places its author in the same school. To Austin, law is the general body of rules, commanding general obedience, addressed by the rulers of a political society to its members. Holland elaborates the same view and defines law as a general rule of *external* human action enforced by a sovereign political authority. The emphasis on externality is intended to show that all that legislation can do is to affect the expression in conduct of the will, and not the nature of the will or motive. We may, while generally admitting this, observe that the enforcement of a formal and outward habit of right living may ultimately in some instances lead to an inward and free acceptance of these habits as a moral code.

(ii) *The historical school* One of the primary defects of the analytical school is that their approach to the study of law is not evolutionary, they regard law as static rather than progressive. The historical school, of which Sir Henry Maine and Savigny are the best known writers, supplies a corrective to this defect. They suggest that law is the result of a varying, progressive, slow and lengthy social process rather than of the arbitrary will of a lawgiver. They grant that the sovereign may be the *formal* source of law, to adopt the expressive phrase of Salmond, they are rather concerned with the *material* source. Therefore law must be studied in relation to its environment, religious, moral, and economic, and in relation to historical tendencies and events.

(iii) *The sociological school* Krabbe (*The Modern Idea of the State*, 1930) is perhaps the most suggestive writer of this school.

His line of thought is best expressed by a quotation from his own work

‘Law is the expression of one of the many judgements of value which we human beings make, by virtue of our dispositions and nature. We subject to our judgement all human conduct, indeed all reality; and we distinguish as many different kinds of value as we apply different kinds of measure. The recognition or otherwise of these values is not a matter of *choice*, we cannot be indifferent or not, at will, our minds react within us, whether we want them to or not, and we feel ourselves subjected, as a consequence of this reaction, to what we call the good, the beautiful and the just. The rule of law likewise is due to human reaction to the sense of justice and is not a matter of external legal authority but an internal human matter.’

Against Krabbe, it may be said <sup>1</sup> ‘You assume the existence of a property of consciousness are you justified in making this assumption? Is not your “consciousness of justice” but an “idle name” which in fact but thinly conceals self-interest? And even if this is not the case, does this so-called sense of justice give us any standard of value, can it produce a standard of value? Do not such standards vary from century to century, from year to year, from nation to nation, from group to group, indeed from man to man?’

Krabbe’s answer to this criticism is <sup>2</sup>

‘If the sense of right among the members of a community differs regarding the rules to be obeyed, those rules possess a higher value which a majority of the members are willing to accept as rules of law. It is necessary that there should be a single rule, and if the persons who have a share in the making of law are of equal importance, a choice between the two rules can be made only with reference to the *number* of persons who assent to each. But if the numbers must decide, this leads of itself to the acceptance of the rule approved by the *majority*, because the fact that it is accepted by the majority shows that it possesses a higher value than any other rule.’

In conclusion, it is sufficient to note that these three views are complementary to one another, that is to say, an adequate philosophy of law should recognize that while the authority of the political sovereign gives law its formal sanction, the real material content of law is shaped partly by the historical

<sup>1</sup> R. Kranenburg, *Political Theory*, p. 142

<sup>2</sup> H. Krabbe, *The Modern Idea of the State*, pp. 74-5

environment in which it grows and partly by the sense of right of the community.

## §2 SOURCES OF LAW

In a formal sense, the State is the source of all law, for it is that from which the authority of law proceeds. But in a discussion of the sources of law, we are rather concerned with those remote and immediate causes which explain the content of law and with the organs through which the State either creates law or grants legal recognition to rules previously unauthoritative. In this sense, six 'sources' of law are enumerated by Holland, viz custom, religion, scientific discussion, adjudication, equity and legislation.

(1) *Custom* Usage is no doubt the earliest form of law-making. Its essential feature is that it is a generally observed course of conduct. No one can say exactly when it arose, but we can hardly doubt that 'it originated generally in the conscious choice of the more convenient of two acts though sometimes doubtless in the accidental adoption of one of two different alternatives, the choice in either case having been either deliberately or accidentally repeated till it ripened into habit. The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common. One man crosses the common in the direction which is suggested either by the purpose he has in view, or by mere accident. If others follow in the same track, which they are likely to do after it has once been trodden, a path is made'.<sup>1</sup> In primitive society, the many relations of life—of the members of the family towards one another, of earning and saving and of buying and selling—were regulated by customary rules. Their sanction was the fear of public opinion, or some kind of supernatural penalty. We have it on Maine's authority<sup>2</sup> that if a Celt of Gaul refused to abide by a Druid's judgement, he was excommunicated, which was esteemed the heaviest of penalties. The Hindus advised sitting *dharna*, which 'consists in sitting at your debtor's door and starving yourself till he pays'. if the debtor allowed the creditor to starve, it was believed, some supernatural penalty would follow. Later some customs began to be enforced by

<sup>1</sup> Holland, *op cit*, pp 56-8

<sup>2</sup> *The Early History of Institutions*, pp 39-40

political authority, only then did they become law. The 'common law' of England consists mainly of customs accepted by courts of law.

(i) *Religion* In the primitive community custom and law could not be easily separated from religion, all rules of life had a religious sanction. The connexion between kingship and priesthood, which we have noticed earlier, is a further illustration of the relation between religion and politics. Indeed, as Wilson points out, the early law of Rome was little more than a body of technical religious rules, a system of means for obtaining individual rights through the proper carrying out of certain religious formulas. The personal laws of the Hindus and Muslims, e.g. laws relating to inheritance and marriage, have obvious points of contact with religion.

(ii) *Scientific discussion* The opinions of learned writers on law have often been accepted as correct law in England, for instance, the opinions of Coke and Blackstone, in America, of Story and Kent, and in India, of Vijnaneswara and Apararka. These opinions do not *ipso facto* become law, they become such through recognition by courts. 'The commentator, by collecting, comparing, and logically arranging legal principles, customs, decisions, and laws, lays down guiding principles for possible cases. He shows the omissions and deduces principles to govern them.'

(iv) *Adjudication* At all times and in all countries, the judges, especially of the highest courts in the land, are important law-makers. *Prima facie* the judges are to interpret and declare the law, but in interpreting and declaring laws, they cannot help making new ones. As Justice Holmes said, judges do and must make law.<sup>1</sup> Whether consciously or unconsciously, in interpreting and applying, they mould and expand the law. This judicial law-making is of particular importance in countries like America, where Legislatures are bound by the terms of a written constitution, and, therefore, the judge has to decide whether they have overstepped the power allowed to them by the constitution.

We must, however, note a difference between legislative law-making and judicial law-making. As Roscoe Pound points out<sup>2</sup> the legislative law-maker is laying 'down a law for the future, hence the general security does not require him to proceed on

<sup>1</sup> See below, ch. XVIII, §7, for examples.

<sup>2</sup> *Law and Morals*, pp. 47-50.

predetermined premisses or along predetermined lines. He is free to proceed along the lines that seem to him best. On the other hand, the judicial law-maker is not merely making a rule for the future. He is laying down a legal precept which will apply to the transactions of the past as well as of the future. Hence the social interest in general security requires that he should not have the same freedom as the legislative law-maker.

'It requires that instead of finding his premisses or his materials of decision where he will, or where expediency appears to him to dictate, he find them in the legal system or by a process recognized by the legal system. It requires that, instead of proceeding along the lines that seem best to him, he proceed along the lines which the legal system prescribes or at least recognizes'<sup>1</sup>

This is a salutary restriction. It serves to hold down the personality of the judge and constrains him to look at causes objectively.

(v) *Equity*. This also is judge-made law, but the difference between adjudication and equity is that the former is an interpretation of the existing laws, whereas the latter is an addition to them. Equity is intended to provide relief where the existing law affords none. Thus in Rome the praetor announced, at the beginning of his year of office, the principles of adjudication which he intended to adopt, and indicated how he proposed to give relief against the rigidity of the established system; for instance, that 'he would allow less formal processes than had hitherto been permitted to secure rights of property or of contract'. Effect was thus given to contracts which could not be found in the limited list of those recognized by the law. The Lord Chancellor in England similarly applies rules of equity.

(vi) *Legislation*. With the growing complexity of modern life, legislation has grown in importance as the main source of new law. In democratic countries laws are made by representative bodies so that the laws made may truly reflect the popular will.

### §3 LAW AND MORALITY

Our discussion of the nature of the State and law has made clear that law cannot encompass the whole of man's activity, because the State is not identical with society. Law is the body of rules enforced by Government. Its ultimate sanction is force.

<sup>1</sup> Roscoe Pound, *op cit*

By its very nature, it can control only external acts, it cannot enjoin a spirit. There is then a place for morality, as distinct from law, and to this we must now turn.

In discussing the relation between law and morality, following Sidgwick,<sup>1</sup> we must distinguish between ideal morality and positive morality. The appeal of the moral law, considered ideally, is to the individual conscience, to the individual sense of right and wrong, of good and evil. That conscience is largely the expression of custom, social training and religious influence, but 'as a principle of conduct, it is the "self-legislating" of a responsible person, choosing in the consciousness of his own liberty the means and ends of welfare'.<sup>2</sup> But as the variations of such individual morality are considerable, it is difficult to generalize its relations with law. Distinguished from individual morality is *positive morality*, which has been defined as 'the body of rules supported by the prevalent opinion of the community (to which the individual belongs) at any given time'.

The differences between law and positive morality are two-fold. (i) The violation of law is punished by Government, of positive morality, by social intolerance. (ii) Law is more definite and consistent than positive morality, because there is a definite body to make law and another to interpret it, positive morality has neither, with the result that there are a number of variations in what is considered right and wrong. To illustrate. Early marriage is now definitely illegal in British India, before it was prohibited by law in 1930 one could not say definitely what the prevailing opinion of the community on the question was.

The great function of positive morality in a well-ordered community is to regulate those spheres of life and conduct which law can hardly affect, e.g. the region of motives, of personal relationships, etc. Social welfare demands the performance by the individual of a number of duties, which, being unsuitable for legal compulsion, must needs be enjoined by positive morality. Thus one must keep one's word and be punctual, must have no sexual relationship outside marriage, must show respect to parents and to elders generally, parents must support their children, give them education and enable them to earn their living, sons must support parents if the latter are unable to

<sup>1</sup> *The Elements of Politics*, ch. XIII

<sup>2</sup> R. M. MacIver, *The Modern State*, p. 155

maintain themselves these and a thousand and one other rules of conduct which help to make social life harmonious and happy are enforced by the community's disapproval of those who break them and the approval of those who obey them. Similarly, social praise is the chief means of evoking charity : the support of the poor and the disabled, the endowment of hospitals, educational institutions and the like, by the rich. These matters are all unsuitable for legal action because their effectiveness depends on spontaneity.

Secondly, where positive morality is in agreement with an action contemplated by a Government, it is a useful ally to that Government in the discharge of its duties. It is easier to enforce a law, and the object of the Government is better achieved, when the Government has behind it the support of public opinion. Take, for instance, the disabilities to which the Harijan community in India is subject—untouchability, unapproachability, the denial of access to places of worship, etc., this is a stain on any civilized community. A Government in India which wants to remove these disabilities will obviously find it easier to achieve its object if it has social opinion on its side. And even where the opposition is mild, it may be worth while for the Government to proceed with its action, for, as Sidgwick remarks,<sup>1</sup> the legislator has, within limits, a valuable power of modifying positive morality. Through the general habit of observing the law and the general recognition of the duty of obeying rules laid down by a legitimate authority, the legislator may obtain a general obedience to rules to which current morality is indifferent or even mildly averse, and then, by the reaction of habitual conduct on opinion, a moral aversion to the opposite conduct may gradually grow up. The law prohibiting child marriage in India is an instance in point. It may be said that the mild opposition to it in the early days has now given way to general acquiescence.

This observation suggests another, when positive morality is clearly against a law contemplated by the Government, it becomes difficult to enforce it. Perhaps the best illustration of this difficulty in modern times is the failure of the prohibition law in the United States of America. Positive morality was against prohibition; instead of supporting the law, it helped

<sup>1</sup> *op cit*, p. 208.

the law-breakers to break the law with impunity, with the result that the law had to be repealed. Valuable as an ally, when in agreement, positive morality becomes dangerous in opposition.

The question may be raised whether a Government is not to be considered timid if it desists from introducing the reforms which it considers essential for the good of society. The answer is that, as Aristotle says, one should proceed on a balance of considerations. In attempting to enforce an unpopular law, a Government may be doing more harm than good by creating and spreading the habit of disobedience to the law. The total social cost of such an attempt may well be greater than the social gain. Further, the principle laid down above does not prevent the legal prohibition of serious social abuses, for, as Green says,<sup>1</sup> the State has always to enjoin or forbid acts of which the doing, or not doing, *from whatever motive*, is necessary to the moral end of society. The prohibition of suttee<sup>2</sup> in India is a clear instance of this.

#### §4 KINDS OF LAW<sup>3</sup>

Laws may be *private* or *public*. 'In so far as the rules of conduct that authoritatively obtain in a political community are devoted to the regulation of interests between individuals as such, they create only private rights and obligations, and the State appears only as their enunciator, and, if need be, their enforcer.' These are private laws. 'Those rules that concern either the organization of the State and the allocation and delimitation of the powers of government, or the direct relations between the State and the individual' are termed public laws.

Again, laws may be *municipal* or *international*. Municipal as distinguished from international law is the law of a State which applies only to individuals and associations within the State, international law is the body of rules which determines the conduct of the general body of civilized States in their dealings with one another.

Laws are also classified into *constitutional* and *ordinary*. Constitutional law may be defined as the body of principles which

<sup>1</sup> *Principles of Political Obligation*, pp. 18 and 37-8.

<sup>2</sup> The immolation of a widow upon the funeral pyre of her dead husband.

<sup>3</sup> An exhaustive classification is not attempted here. Our aim is rather to explain certain terms which occur frequently in the text.



regulates the powers of the Government, the rights of the governed and the relations between the two To quote W W Willoughby,<sup>1</sup> constitutional laws are 'those laws which relate directly to the form of government that is to exist and to the allotment of powers to, and the imposition of limitations upon, the several governmental organs and functionaries' All other laws are ordinary laws<sup>2</sup>

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<sup>1</sup> *The Fundamental Concepts of Public Law*, pp 83-4

<sup>2</sup> It ought to be added that constitutional laws are public laws, but all public laws are not necessarily constitutional laws The term 'public law' is wider than constitutional law See Holland, *op cit*, pp 368-9

## CHAPTER VI

# LIBERTY

### §1 MEANING OF LIBERTY

The term 'liberty' is used in Politics to mean two things, national liberty and individual liberty. The former obviously means the independence of a State from other States. It is with the latter, individual liberty, that we are concerned in this chapter.

In its absolute sense, liberty means 'the faculty of willing and the power of doing what has been willed, without influence from any other source or from without'. A moment's reflection tells us that a liberty of this unlimited character is an impossibility for all at the same time. Neither the presence of the State nor its absence can ensure it. Politics rests on two fundamental facts of human nature: every man likes to have his own way, at the same time he possesses an instinct for sociability. From this it follows that the maximum freedom that an individual can enjoy is, as the Declaration of the Rights of Man (1789) put it, the power to do everything that does not injure another.

In practice, therefore, an analysis of the modern concept of liberty shows two main ideas:

(i) The individual wants to express his personality in thought, word, and act. He demands freedom, i.e. an absence or a lessening of restraint (or restrictions) on his freedom of thought, speech and action both from the Government and from private individuals and associations.

(ii) Secondly, freedom implies, paradoxically, the imposition of some limitations with a view (a) to securing the equal freedom of all, e.g. the law of libel and criminal law generally and (b) to providing opportunities or conditions of life which will enable men to develop their personalities, e.g. the provision of compulsory education, factory laws, etc.

We may now give some recognized definitions of liberty:

'The opposite of over-government' (Seeley)

'The absence of restraint upon the existence of those social conditions which in modern civilization are the necessary

guarantees of individual happiness' (Laski, *Liberty in the Modern State*)

'The eager maintenance of that atmosphere in which men have the opportunity to be their best selves' (Laski, *A Grammar of Politics*)

'Freedom is not the absence of all restraints but rather the substitution of rational ones for irrational' (M'Kechnie)

The careful student will notice that the first two of these definitions emphasize the negative (i.e. absence of restraint) and the last two, the positive (the presence of opportunity) aspect of liberty. Taken together they emphasize the idea that freedom exists not only in the absence of restraint but also in the presence of opportunity. It is remarkable that those who possess wealth and power think of liberty primarily in terms of absence of restraint, those who have no secure livelihood and are dependent on others for their existence, i.e. the mass of wage-earners, desire the provision of opportunity to live the good life.

Laski<sup>1</sup> classifies the content of necessary individual liberty under three heads :

(i) Private liberty is the opportunity to exercise freedom of choice in those areas of life where the results of one's efforts are mainly personal to oneself, e.g. freedom of religion and personal security

(ii) Political liberty (sometimes also called constitutional liberty) is the right of an individual to take part in the affairs of the State, through the right to vote, the right to stand as a candidate for election, and freedom of speech, press and meeting

(iii) Economic liberty is security and the opportunity to find reasonable significance in the earning of one's daily bread, made possible through such rights as the rights to work, to reasonable hours of labour, to an adequate wage and to self-government in industry

## §2 CIVIL LIBERTY RIGHTS OF CITIZENSHIP

Laski's analysis gives one a general idea of the freedom that is considered desirable, but the freedoms that he outlines have not always been recognized, or recognized to the same extent, by all States. The sum total of the rights recognized by law and secured by the coercive agency of the State is known as civil

<sup>1</sup> *A Grammar of Politics*, chs. III and IV

liberty 'Civil liberty consists of the rights and privileges which the State creates and protects for its subjects.'<sup>1</sup> The most important of these rights, recognized in various degrees in different States, are the following

(i) *The right to life* The most fundamental of all rights is the right to life, the foundation on which the superstructure of other rights can be built up. In order to safeguard this right, therefore, many States punish attempts at suicide, and impose the maximum penalty of capital punishment on those who attempt to kill others. That there is no *right* to suicide follows from the very nature of 'right', for 'right' is a condition of social life to enable one to develop one's moral personality, suicide annihilates personality.

On the advisability of capital punishment, however, there is no unanimity of opinion. Modern thought is tending to the view that the State will do most to promote regard for the sanctity of life by itself paying regard to that sanctity, i.e. by refusing to take life in any circumstances. Has not Bentham said that the State affects the conduct and actions of its citizens more by the standards governing its own actions than by the penalties it visits upon others? Besides, the risk of injustice with the death penalty is great, because there is the element of finality about it. If a man has been hanged, the subsequent discovery of his innocence cannot avail him, neither judges nor juries are infallible. The imposition of capital punishment takes for granted that a man may be permanently incapable of rights, it may be doubted whether this presumption is one which we are ever entitled to make. Experience has not clearly proved that capital punishment is effective in keeping down the number of murders committed in a community, for as Roy Calvert states,<sup>2</sup> where the death penalty has been abolished, as in Sweden, Holland and Switzerland, there has been a decrease in murders or, at any rate, the homicidal tendency has not increased.

These arguments are not conclusive. The case for capital punishment is that the association of the extremest terror with certain actions, such as treasonable outbreaks, murder, etc., may be necessary among certain communities to preserve the possibility of a social life based on the observance of rights.

<sup>1</sup> R. G. Gettell, *Political Science*, p. 148.

<sup>2</sup> E. Roy Calvert, *Capital Punishment in the Twentieth Century*

(ii) *The right to work.* This is implicit in the right to live, because, as Laski rightly says, man 'is born into a world where, if rationally organized, he can live only by the sweat of his brow'. The right to work cannot obviously mean the right to particular work, it can mean no more than the right to be occupied in producing some share of the goods and services necessary for society.<sup>1</sup> Few States outside Russia have recognized the legal right to work, for, it is argued, its recognition may throw too heavy a burden on society, society must be able either to provide work for the individual when the individual cannot find it for himself, or maintain him during the period of his unemployment. Unemployment insurance, to which the individual partly contributes, is now finding favour with some States, but there are many States like India which have not yet thought of it. The moral case for the right to work is that, under the conditions of the modern industrial system, society may be held partly responsible for chronic unemployment.

(iii) *Personal safety and freedom.* Blackstone describes this right as a person's legal and uninterrupted enjoyment of his life, his limbs, his body and his health, it also means 'the power of locomotion, of changing one's situation or removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, except by due course of law'. Thus a person may not be assaulted, wounded or imprisoned, except by due process of law. He has a right not to receive injury from any dangerous substance or animal kept by another. In order to secure this, Governments everywhere permit the use of such force as is necessary for self-defence and make slavery illegal. A person unlawfully imprisoned may recover his freedom by means of a writ of habeas corpus. One who is injured by the careless action of another can claim compensation for damages. This right has, according to Holland,<sup>2</sup> two limitations. First, it is limited during the earlier years of life by the right of parents and guardians to chastise and keep in their custody persons of tender age. Secondly, it may be partially waived. Thus a person who engages in a lawful contest of strength waives, by so doing, as against his antagonist, his right not to be assaulted and battered,

<sup>1</sup> *A Grammar of Politics*, p. 106

<sup>2</sup> *The Elements of Jurisprudence*, pp. 170-1

a sailor who goes on board ship waives for the voyage his right to direct his own movements

(iv) *The right to reputation* Holland describes it thus <sup>1</sup> 'A man has a right, as against the world, to his good name, that is to say, he has a right that the respect, so far as it is well-founded, which others feel for him shall not be diminished', whether by words (spoken or written) or gestures or pictures. A defamatory statement is therefore made punishable by law, if it can be shown that (a) such statement is made in public, (b) it is untrue, (c) it is not of public importance. 'Statements in the course of judicial proceedings... fair reports of trials, legislative debates or public meetings, fair comments on public men and fair criticisms of literary and artistic productions are privileged'

(v) *Religious freedom* It is well known that it took centuries for this right to be recognized by law, prosecution for heresy was common enough in the sixteenth and seventeenth centuries. The right of following one's own religious faith and worship has, however, come to be gradually recognized by modern States. The full implications of this right have, paradoxically, been nowhere better stated than in the Weimar Constitution of Germany <sup>2</sup>

All inhabitants of the Reich enjoy full liberty of faith and of conscience . . .

Civil and political rights and duties are neither dependent upon nor restricted by the practice of religious freedom

The enjoyment of civil and political rights, as well as admission to official posts, are independent of one's religious creed

No one is bound to disclose his religious convictions. The authorities have the right to make inquiries as to membership of a religious body only when rights and duties depend upon it or when the collection of statistics ordered by law requires it

No one may be compelled to take part in any ecclesiastical act or ceremony, or to participate in religious practices or to make use of any religious form of oath

There is no State Church

Freedom of association is guaranteed to religious bodies

Every religious body regulates and administers its affairs independently, within the limits of the laws applicable to all

<sup>1</sup> op cit, pp 183-4

<sup>2</sup> Articles 135-41

The members of the armed forces are guaranteed the necessary free time for the performance of their religious duties.

Religious bodies have the right of entry for religious purposes into the army, hospitals, prisons or other public institutions, so far as is necessary for the conduct of public worship and religious ministrations, but any form of compulsion is forbidden.

It need hardly be added that religious freedom is subject to the condition that the exercise of such a right must not disturb the peace.

(vi) *Education* The importance of education is hardly a matter for discussion. It is necessary as an indispensable condition to free individual development, and to fit the individual for the tasks of citizenship. The legal content of this right varies from State to State. In Britain, a parent has the right to demand free education for his children in a public elementary school. 'If there should be no such school within convenient distance, the State, after inquiry, will cause one to be established.' Besides, the State also helps higher education through the provision of funds and an inspecting agency. In India, free elementary education is not a legal right everywhere, much leeway has yet to be made up if that ideal is to be realized.

(vii) *Freedom of speech, public meeting and publication.* This means the right to say or write what one chooses 'provided that this is not blasphemous, obscene, seditious or defamatory of another's reputation, and the right to attend any lawful public meeting' <sup>1</sup>

It is hardly necessary to argue in detail the case for freedom of opinion. The main reasons are clear enough. It is a means of self-protection, it enables the rulers to become acquainted with the experience and the wants of the ruled, its denial is not only an assumption of infallibility, but would mean that the 'decisions registered as law reflect not the total needs of the society, but the powerful needs which have been able to make themselves felt at the source of power'. Terror does not alter opinion, it only drives the opinion underground, thereby making it more dangerous. Those who oppose freedom of opinion are losers, because the silenced opinion may contain a portion of truth—after all, in a classic phrase, the heresies of today are the

<sup>1</sup> W. D. Aston and P. Jordan, *Citizenship Its Rights and Duties*, pp. 42-3

orthodoxies of tomorrow Finally, a man always learns by having an open mind

But freedom of opinion means freedom to express one's ideas on general subjects, on themes of public importance, rather than on the character of particular persons The statements expressed must be true Where libel takes place, i.e. where opinion is expressed with a malicious intent to injure a person, the person concerned ought to be allowed damages, and, if necessary, to demand proper publicity for the apology where the libel is proved. The State has also the right to protection against the kind of public utterance which is bound to result in disorder Thus the State may take cognizance of incitements to break its laws or defy its authority, for such incitement is more than the expression of opinion 'The State is entitled to suppress an incitement which itself is an attempt to dethrone the rule of opinion' But, as Laski rightly points out, no government is entitled itself to assume that disorder is imminent, the proof must be offered to an independent Judiciary And the proof so offered must be evidence that the utterance to which it takes exception was, at the time and in the circumstances in which it was made, definitely calculated to result in a breach of the peace Its prohibitions, in other words, must not be preventive prohibitions 'It must not prohibit a meeting before it is held on the ground that the speaker is likely to preach sedition there' Comments on a case which is *sub judice* may be regulated, as they would interfere with the course of justice And, finally, published documents should contain the name of the printer and the publisher, where newspapers publish attacks on a person, they may be compelled to publish gratis a reply from the person concerned

Freedom of opinion in war time raises several important issues<sup>1</sup> It is agreed on all hands, of course, that a citizen must subject himself to greater restrictions than in normal times in the interests of his country's security and independence, he cannot, for instance, be allowed to communicate military secrets to the enemy But has he the right to oppose his nation's entry into and prosecution of the war if he believes honestly that war as such is wrong or to criticize the Government's conduct of military

<sup>1</sup> See Laski, *Liberty in the Modern State*, Pelican Edition, pp 116-21, for an able discussion of these issues



operations, diplomatic policy, war-aims and peace proposals? All governments normally take the safe course and limit the expression of opinion to opinion which does not, in their judgement, hinder the prosecution of war, on the ground that it is important above all to present a war-time unity of outlook. It is sufficient to say, here, that such interference does not always lead to the happiest results and involves a serious invasion of civic rights which can be justified only on the—not always correct—assumption that the Executive is always well-informed and correct and private citizens are always ignorant and wrong.

(vii) *The right of association* There are many voluntary associations in modern times devoted to the promotion of objects in which their members are interested—social, religious and economic. These quite largely determine a man's choice of friends, his career and opportunities. In the expressive words of Laski, they give the individual 'a feeling that he has found himself, a power of self-recognition that is an invaluable factor in the achievement of personal harmony. What, without them, is a chaotic world, becomes a world ordered by the opportunity to do with others who share an experience akin to his own'. In a previous discussion,<sup>1</sup> we have indicated the claims of the pluralists on behalf of voluntary associations, it is sufficient here to say that no modern State accepts such wide claims. While it permits a wide (and varying) freedom in the formation of such associations and allows them to exercise large powers, it also prevents such acts by recognized associations as fundamentally contradict its own purposes. Thus while a communist association has the right of spreading the ideals of communism by peaceful persuasion, it cannot attempt actions such as military drill and the purchase of munitions, which show a determination to overthrow the social order by violent means.

(ix) *Family rights* These rights result from the institution of marriage, and include a man's marital right to the society of his wife and vice versa, and the custody and control of his children and to the produce of their labour till they arrive at years of discretion. The marriage tie terminates on the death of one of the parties or their divorce. As to the permissibility of divorce and the grounds on which it ought to be granted, the widest difference prevails among different societies.

<sup>1</sup> See above, pp. 56-7

(v) *Property* Almost every State outside Russia recognizes the right to private property. This right is held to include the right to the unhampered use of one's gains, whether land or goods, the right of exclusive use, the right to destroy and the right to alienate by gift or exchange during life, and the right to bequeath. The rationale of the right to property is being widely questioned. Without its abolition, equality is declared to be impossible. On the other hand, it has been argued that (a) the right to own private property is derived from nature, not from man, and the State has by no means the right to abolish it but only to control its use, (b) men in general need an incentive to labour, the power to acquire property supplies such an incentive, (c) property is the return made to the individual for effort, (d) it is the nurse of virtues essential to society, such as love of one's family and inventiveness, and (e) historically speaking, progressive societies have been those built upon the regime of private property. The true justification of property is that it is needed for the development of personality.<sup>1</sup> Rights are those conditions of social life without which no man can seek in general to be himself at his best. 'And if property must be possessed in order that a man may be his best self, the existence of such a right is clear' (Laski).

At the same time, the right to property, like other rights, has limitations. These limitations arise from the twofold aspect of property, individual and social.

'The right to own private property has been given to man by nature, or rather by the Creator Himself, both in order that individuals may be able to provide for their own needs and those of their families, and also that by means of it the goods which the Creator has destined for the whole human race may truly serve this purpose.'<sup>2</sup>

It follows from this that men must take into account in this matter not only their own advantage but also the common good. To define in detail the necessary limitations on the right to property is an important function of government. Thus all modern States have laws regulating the transfer of property in order to ensure that the transfer is made between persons possessing at the time mature reason, without coercion and without wilful or

<sup>1</sup> W. S. M'Kechnie, *The State and the Individual*, p. 337.

<sup>2</sup> Papal Encyclical *Quadragesima Anno* (1931).

careless misrepresentation Similarly they regulate inheritance and bequests in order to see that reasonable expectations on the part of the members of a family are not upset and, generally, to see that the social virtues of thrift and industry are not allowed to decline

(xi) *The right to the general advantages of social life* By this is meant (a) the right of a person to the unmolested pursuit of the occupation by which he gains his living ; (b) the free use of public roads, parks and libraries , (c) the use of the posts, telegraphs and railways subject to prescribed payments , (d) the right of resort to law courts in vindication of legal claims , (e) the right to the use of public dispensaries and hospitals, subject to the rules , and, generally, (f) the right to avail oneself of those communal advantages which are provided by the modern social service State.

The citizen also has certain duties Rights are privileges, duties are obligations The most general duties are to obey the laws of the State and pay the taxes The citizen must refrain from interfering with the rights of other citizens, such as freedom of person and security, property, reputation, etc Again he must sit upon juries when chosen, appear before the courts as a witness when summoned to give evidence and treat courts of law with proper respect. Where military service is made compulsory by law, it is obvious that the citizen has to serve as a soldier for the prescribed period

### §3 POLITICAL LIBERTY

In addition to these rights, the democratic State also recognizes political liberty, i.e. the right to a share in the Government of the State As Rousseau wrote,<sup>1</sup> in this type of State, the associates are called collectively a *people*, severally *citizens* as sharing in the sovereign authority and *subjects* as submitting to the laws of the State A citizen, as Aristotle said, is one who is capable of ruling as well as being ruled The necessity for this right is argued in detail later,<sup>2</sup> it is sufficient here to refer to the remark of Laski, that exclusion from power means in the long run exclusion from the benefits of power The exercise of political power is also a necessary training in social responsibility

<sup>1</sup> *The Social Contract*, bk I, ch VI

<sup>2</sup> See below, ch X, §3

Political liberty involves the following rights :

(i) The right to vote, the normal rule in democratic States is that all adults have the right to vote, subject to the reasonable disqualification of criminals, lunatics and idiots. Some States like France and Switzerland also deny the right to women.

(ii) The right to stand as a candidate for election is a corollary of (i). Invariably every one who is a voter also has the right to stand as a candidate for election, some States, like the United States of America, however, prescribe a higher age qualification for the representative (21 for a voter and 25 for a member of the House of Representatives).

(iii) Periodical elections. Power cannot be conferred on any body permanently, the accountability of the Legislature to the electorate necessitates periodical elections.

(iv) Equal eligibility for government office, provided the necessary technical or professional qualifications are satisfied.

(v) The right to criticize the Government. This is provided by the rights of speech, public meeting, publication, and association. The importance of this right is that, especially in a democratic State, the Government must be in touch with public opinion, otherwise the taunt of Rousseau,<sup>1</sup> that the English people are free only during the election of members of Parliament, would be justified. If government must be based on the consent of the governed, law-making must be the result of free discussion and continuous consent. Political liberty is not safe or complete where the people's voice is taken into account only at election times, or where there are no centres of association other than the political. As Lindsay put it so effectively, in a democracy public opinion, instead of being something expressing itself only at authorized times and only in a choice of representatives, is something always there—always being influenced and influencing—an invisible public meeting of the whole country in perpetual session.

The provision of these rights does not mean that every one will exercise his share in government. What the law can do is to provide the rights, it can at no time make sure that the rights will be exercised or exercised for the common good.

<sup>1</sup> *ibid*, bk. III, ch. XV

## §4 SAFEGUARDS OF LIBERTY

The question that now arises for consideration is How best are we to ensure that these rights are secured to the citizen, so that he may really be free ?

(i) Law, as is argued later,<sup>1</sup> is clearly an important condition of liberty Montesquieu argued,<sup>2</sup> indeed, that it is principally by the nature and proportion of punishments imposed by law that liberty is established or destroyed

(ii) The independence of the Judiciary is essential to freedom By this is meant that judges must, as far as is humanly possible, be made independent of the Executive in the discharge of their official duties It must be remembered that judges may be called upon to protect the liberty of individuals from invasion by private individuals and by Government officers It is obvious that they will not feel free to deal with the latter, if, for doing their duty, they are likely to incur the wrath of the Executive, and if, on that account, they are likely to be dismissed or otherwise adversely affected It is usual, therefore, to provide that the salaries of judges shall not be diminished during their term of office and that they shall not be dismissed by the Executive on their own responsibility In Great Britain judges may be removed by the Crown only on an address presented by both Houses of Parliament, in the United States of America a judge may be removed only by impeachment by the lower House before the upper House, in India a judge of the highest court may be removed (before his age of retirement) on the ground of misbehaviour or of infirmity of mind or body only if the Judicial Committee of the Privy Council, on reference being made to them, report that the judge ought on any such ground to be removed As J Kent has said 'To give the judges the courage and the firmness to do their duty fearlessly, they ought to be confident of the security of their salaries and station.'

(iii) Democracy is a helpful factor It is a form of government in which political power is with the mass of the people As John Stuart Mill insisted, its superiority over other forms of government is based on the principle that the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually dis-

<sup>1</sup> See §5 of this chapter

<sup>2</sup> *The Spirit of Laws*, bk XII, ch II

posed, to stand up for them. But at the same time, democracy by itself is no automatic guarantee, for democracy involves government by the majority, and the majority may sometimes tyrannize over the minority. Unless, therefore, the habit of tolerance is widespread in a community, there is no reasonable chance of the widespread enjoyment of liberty.

(iv) A healthy development of local self-governing institutions further helps freedom, for, as Laski truly says, the more widespread the distribution of power in the State, the more decentralized its character, the more likely men are to be zealous for freedom. Maximum satisfaction is at least partly a function of maximum consultation.

(v) A declaration of fundamental rights, included as part of a written constitution, is a necessary safeguard. A declaration of rights is a series of rules, generally embodied in a written constitution, setting forth the fundamental civil and political rights of the citizens and imposing certain limitations on the power of the ordinary Government, as a means of securing the enjoyment of those rights. Thus in the constitution of the United States of America, the free exercise of religion, freedom of speech and of the Press, the right of the people to assemble, the right to petition, the right to keep and bear arms, the right to be secure in person, houses, papers, etc., against unreasonable searches and seizures, and trial by jury, are inserted in the constitution as fundamental rights. The Weimar Constitution of Germany included, in addition, the equality of sexes in civic rights, the secrecy of correspondence, secret elections, free education, property, freedom of contract, freedom of association and the right of entry of all religious bodies to public institutions. The constitution of India does not contain a declaration of rights. It is worthy of note, however, that Indian political opinion has always been in favour of a declaration particularly as a means of protecting the essential rights of minorities, it suggests that the declaration should include the provision of educational facilities for all, the use of minority languages as media of instruction, the distribution of public funds for educational and charitable purposes, the assuring of the right to establish, manage and control charitable, educational, social and religious institutions, the maintenance of family law and personal status in accordance with the usage of the groups concerned, and the assuring of the use of all roads,

streets, tanks, etc (maintained or licensed for the use of the public) to every citizen irrespective of race, religion, or caste.

The value of a declaration of rights as a safeguard of freedom is this it draws attention to the fact that vigilance is essential in what Cromwell called 'fundamentals' and since these rights can be modified only by a special amending body, as distinguished from the ordinary Legislature, the constitutional declaration of rights is a check on possible excesses by the *ordinary* Government

(vi) Finally, indeed, eternal vigilance is the only sure safeguard of freedom The knowledge that the citizens are alert and will not meekly submit to unreasonable interference with their rights, and that they will be prepared to fight for them, will help to prevent such interference

### , §5 DOES LAW HELP OR HINDER LIBERTY?

What is the relation of law to liberty? How far can the commands of the State help or hinder the eager maintenance of that atmosphere in which men have the opportunity to be their best selves? Two opposing answers have been given

(i) Every law is a veritable freedom. Thus Locke .

'Law is, in its true notion, not so much the limitation as the direction of a free and intelligent agent to his true interest . So that however it may be mistaken, the end of law is not to abolish or restrain but to preserve and enlarge freedom.'

This view, as we have seen, is best typified in the Idealist view of the State and law

(ii) 'The more there is of the one, the less there is of the other' (Dicey) 'Law is an institution of the most pernicious tendency' (William Godwin) Spencer called his book *Man versus the State* this can be explained only on the assumption that he thought that law and liberty were opposed to each other An extreme instance of this view is to be found in the attitude of the anarchists who would abolish government and law altogether

These are two extreme views, and, as often happens, the truth lies between the two Law is an important condition of liberty in three ways . (i) Law protects one's freedom from invasion by others, from this point of view, law and liberty, far from being opposed to each other, are correlative terms, because, as Hobbes keenly realized, no individual liberty is safe without

the assumption of a sovereign power to make and enforce law. The criminal code is an obvious example (ii) By providing certain essentials of social life, such as education and healthy conditions of life in factories, law may promote the real liberty of the individual and enable him to realize his personality (iii) In a special sense, the fundamental or constitutional law of a State may, as in America, protect the freedom of the individual from invasion by the Government of the day, by providing some fundamental rights, which that Government is powerless to alter<sup>1</sup>

But all laws are not necessarily conducive to liberty, some may be positively injurious to freedom. It is unreal to contend, as do the Hegelians, that one who is asked to give up belief in a religion in which he passionately believes, and to desist from expressing opinions which he thinks are right and ought to be expressed, is really free. Hence the question whether law promotes liberty must be answered on the merits of each case—with the qualification that in a well ordered, civilized community, the institution of law normally helps liberty by preventing individuals and associations of individuals from 'taking the law into their own hands'. The existence of a law-enforcing agency helps the liberty of individuals by denying them the use of force and insisting on a peaceful settlement of their differences. To the extent, moreover, that laws are passed after wide consultation and are based on the consent of the people who are affected by them, the sense of freedom is increased. But there must be continuous vigilance to see that there is no over-government and excess of laws, for, as Seeley insisted, liberty is the opposite of over-government. Our aim should be to secure such a balance 'between the liberty we need and the authority that is essential as to leave the average man with the clear sense that he has elbow-room for the continuous expression of his personality'.

## §6 THE ORGANIC THEORY

The concept of individual liberty is often connected with a theory of the State known as the organic (or organismic) theory, indeed, supporters of the theory have used it in support of contradictory ends—of more and less liberty.

The organic theory compares the State to an organism. an organism is a living structure composed of parts different in

<sup>1</sup> See above, §4 (v)



kind, these parts are complementary to one another. The health of the organism depends on the healthy discharge by each part of its own function. Thus the human organism has several parts, such as the eye, the ear, the hand and the leg; the health of the body depends upon each part performing its specific function. Similarly, society is an organism, with its several parts closely related to, and dependent upon, one another. According to the detailed analogy which one of the exponents of the theory, Spencer, has made, society has three systems corresponding to the sustaining system, the distributory system and the regulating system in the human body. The analogy may be presented thus:

THE PARTS	NATURAL ORGANISM	SOCIAL ORGANISM
<i>The sustaining system</i>	The alimentary canal (mouth, gullet, stomach, intestines)	Manufacturing districts, and agricultural areas
<i>The distributing system</i>	Blood vessels (heart, arteries and veins)	Roads, canals, railways, posts, telegraphs
<i>The regulating system</i>	Nerve-motor mechanism (brain, spinal chord, nerves)	Government

The climax of the comparison is reached when the State is made a person.

‘The purpose of the whole constitution is to enable the person of the State to express and realize its will, which is different from the individual wills of all individuals, and different from the sum of them.’<sup>1</sup>

Further, the State has a masculine character in contrast with the feminine character of the Church.<sup>1</sup>

Two different conclusions are possible, and indeed have been drawn, from this comparison. First

‘As nothing that affects the parts can be indifferent to the whole, the State is bound by its laws and government to aim jointly with the citizens at the perfect development of every

<sup>1</sup> J. K. Bluntschli, *The Theory of the State*, pp. 22-3

individual in the community 'Nothing is beyond the proper sphere of government in pursuing this high end' (M'Kechie)

A truly organic State has an all-embracing sphere. It may refrain from unwise interference in special cases, but it has the *right* to interfere in all. This is a logical deduction from the theory, for the central idea of the theory, as Leacock suggests, is to set aside the contrast between the individual and the State by amalgamating them into one. 'As is the relation of the hand to the body, or the leaf to the tree, so is the relation of man to society. He exists in it, and it in him.' The part, therefore, must be subordinate to, and may be sacrificed for, the welfare of the whole.

The second (and indeed contradictory to the first) conclusion is that arrived at by Spencer, viz. that the State's functions should be limited to the prevention of violence and fraud. The individual should otherwise be left alone. This conclusion Spencer arrived at by distinguishing the natural from the social organism. 'The natural organism is *'concrete'*, the social organism *'discrete'*, i.e. the units of a natural organism are physically contiguous and are fixed in position, they are not so in society. Moreover, in the body of an animal the feeling and the consciousness are confined to a special tissue (viz. the cerebrum or brain), in society, all members are so endowed. It follows that not the happiness of the whole but individual happiness is the purpose of the social organism. This can best be achieved by the Government following the biological law of specific function and confining itself to the function for the performance of which it was evolved, viz. to assure internal and external security.

A theory which admits of such contradictory conclusions must needs be defective, its first defect is a tendency to carry the comparison between the natural and the social organisms too far. As Barker puts it, society is like an organism, but is not an organism. The differences between the two, which Spencer recognized, are in reality so fundamental that he was able to save the social organism only by cutting it into pieces! Secondly, the theory gives one no clear guidance as to the limits of State activity, for, as we have seen, its exponents arrive at diametrically opposite conclusions. If we accept one of them, there is a danger of sacrificing the individual to the State, if we follow the other,

there is all the danger of *laissez-faire*<sup>1</sup> To say, as M'Kechmie says,<sup>2</sup> that the theory contains the germ of the whole truth of political philosophy and that it is in itself a complete theoretical solution of the problem of the sphere of government is certainly to overshoot the mark.

Yet, the theory has some value It emphasizes the idea that society is something more than an aggregate of individuals loosely thrown together without any unifying bond, its members are dependent upon one another The welfare of each is involved in the welfare of all The attainment of the common purpose therefore depends on the proper performance by every citizen of his duties Properly grasped, the theory may thus be useful in reminding citizens of their social obligations

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<sup>1</sup> See below, ch VIII, §3

<sup>2</sup> op cit, pp 56 and 431.

## CHAPTER VII

# EQUALITY

### §1 THE MEANING OF EQUALITY

In the Declaration of the Rights of Man (1789) issued by the National Assembly of France during the French Revolution, the following categorical statement is made 'Men are born, and always continue, free and equal in respect of their rights' A similar statement is found in the American Declaration of Independence (1776) 'We hold these truths to be self-evident, that all men are created equal'

It will be observed that the natural equality of man has been asserted in these documents to be a self-evident truth But in what sense are men by nature equal?

The most striking fact about human life is the inequality of men, not their equality Men are unequal in bodily proportion, physical strength, intellectual abilities, and moral capacity This inequality springs from two sources, nature and nurture Men are not born equal, some babies are born white, some black and very little can be done to alter the colour of either Provided a child is receiving an adequate diet, it is probably impossible to add an inch, let alone a cubit, to its stature, though a few pounds might be added to its weight by proper nutrition In point of mental equipment, some are congenitally feeble-minded, others are not The effects of physical and social environment enhance or reduce the inequalities present at birth The statement that all men are equal is, then, as erroneous as that the surface of the earth is level

Inequalities are inescapable facts Why then is equality assumed and asserted as the ideal? Is not the assertion that all men *ought* to be equal as absurd as that the earth ought to be one vast plain?<sup>1</sup> There are two grounds for the assertion, one historical, the other ethical, which suggest that, after all, the ideal of equality, properly interpreted, is not as absurd as at first sight it would appear to be

<sup>1</sup> M'Kechne, *The State and the Individual*, p 323

(i) It is to the credit of Ritchie to have shown<sup>1</sup> that the ideal of equality is an inheritance from the inequalities of ancient societies. It arose from the idea of peerage, an order or caste of nobles who recognized each other as in some respects and for some purposes equal, while asserting their superiority to others. The idea of equality has thus grown out of the idea of privilege, the same is the case with the idea of freedom. 'Both ideas are the outgrowth of aristocratic and slave-holding communities. It was in *contrast* with the subject and the slave that men first felt themselves equal and free.'

(ii) Ethically, men as such are equal in the possession of rationality. This at once separates man from the lower animals and connects him with his fellow men. He has the power of reflecting on his place in the universe, which power, however little developed, exists in germ in every human being. Man is capable of sharing in the same type of mental life as his neighbour, even though he may actually be inferior to that neighbour in his mental and moral stature. It is then the infinite worth of every human soul, its potential membership of a common society, which gives a basis, a meaning, to the ideal of equality. It is this that effectually marks man off from chattel, and even from the highest animal. It is this thought presumably, as MacCunn says,<sup>2</sup> that arises in the religious mind when it is said that all men are equal in the sight of God.

Let us admit, then, that the ideal of equality has some basis. But the more difficult question to answer is: What is its precise content? To what extent is the ideal capable of being translated into practice, in the laws and in the institutions of society?

(i) *Civil equality*. This is perhaps best described as equality before law. Where all the citizens of a State have the same status in the sphere of private law, which concerns the relations between one individual and another, they are said to possess *civil* equality. The recognition of civil equality means that the citizens of a State are treated alike in respect of the control that may be legitimately exercised over them and of the measure of protection which they may be entitled to demand at the hands of a government. Thus the Weimar Constitution of Germany;<sup>3</sup>

(a) All Germans are equal before the law.

<sup>1</sup> D. G. Ritchie, *Natural Rights*, p. 248.

<sup>2</sup> *Ethics of Citizenship*, p. 4.

<sup>3</sup> Article 109.

(b) Men and women have fundamentally the same civic rights and duties

(c) Public legal privileges or disadvantages of birth or rank shall be abolished

These points hardly need defence, justice obviously demands that the courts of a State in dispensing law shall treat all citizens without fear or favour

(ii) *Political equality* That a measure of equality in the share which the citizens of a State have in their government, is desirable, indeed essential, is now recognized by the best thinkers of the age. The demand for such equality is the basis of democracy, the demand that the system of power be erected upon the similarities and not the differences between men

'Of the permanence of this demand there can be no doubt, at the very dawn of political science Aristotle insisted that its denial was the main cause of revolutions. Just as the history of the State can perhaps be most effectively written in terms of the expanding claims of the common man upon the results of its effort, so the development of the realization of equality is the clue to the problem of democracy'<sup>1</sup>

The merits and defects of democracy are described elsewhere,<sup>2</sup> here, it is sufficient to remark that the concrete expression of political equality is the conferment on all adult citizens of the right to vote and its corollaries, the right to stand as a candidate for election and equal eligibility for administrative and judicial posts provided the necessary technical qualifications are fulfilled.<sup>3</sup> It need hardly be added that the legal recognition of this minimum political equality does not mean that the effective influence exercised by all citizens is equal. The wiser and the better citizens do exercise greater influence on the Government through the greater and more effective part they play in moulding public opinion. The rights we have mentioned above ensure but a minimum political equality. They provide a necessary armour for the average man against the abuse of political power by the few, for, theoretically at any rate, as James Mill said, in democracy the rulers being all, the interests of the rulers are the interests of all. They also enable those who are politically minded to play their legitimate part in public life which

<sup>1</sup> *Encyclopaedia of the Social Sciences*, Vol V

<sup>2</sup> See below, ch X, §3

<sup>3</sup> See also ch X, §3, in this connexion

cannot be closed to those who are fit for it without contracting their life and stunting their development.

(iii) *Economic equality*. Economic equality has been interpreted by some writers like Bryce in a literal sense as 'the attempt to expunge all differences in wealth, allotting to every man and woman an equal share in worldly goods' A reasonable view of equality must dismiss such a conception as being beyond the bounds of practical politics, for, even if we have a clean slate to start with, men's differences in need and capacity are too great to enable equality of wealth to be maintained for any length of time

'Render possessions ever so equal,' said Hume, 'men's different degrees of art, care, and industry will immediately break that equality. Or if you check these virtues, you reduce society to the most extreme indulgence'

But it is quite possible and desirable to reduce the excessive inequalities of existing fortunes Properly interpreted, economic equality therefore means the provision of adequate opportunities for all the right to work, to adequate wages, to reasonable hours of labour and leisure and to self-government in industry, so that every one may have a fair start in life and the chance to develop the best that he is capable of It means a minimum equality, equality up to the margin of sufficiency But it allows differences of income, provided they are capable of explanation in terms of social good It only urges, to use Laski's phrase,<sup>1</sup> that no man shall be so placed in society that he can overreach his neighbour to the extent which constitutes a denial of the latter's citizenship Equality, as Laski insists, is not identity of treatment Fundamentally it implies a certain levelling process,<sup>2</sup> and is in fact largely a problem in proportions It is such an organization of opportunity that no man's personality suffers frustration to the private benefit of others<sup>3</sup>

Can the view of equality outlined here be justified? Let Hume answer:

'Wherever we depart from . . . equality,<sup>4</sup> we rob the poor of more satisfaction than we add to the rich The rule of equality is useful and has been shown by history to be not wholly impracticable'

<sup>1</sup> *A Grammar of Politics*, ch IV

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> Hume uses the term to mean relative, not absolute, equality

By adopting it, we avoid the ugly spectacle of an economic system in which the luxury of a few is paralleled by the misery of the many. We shall no more be subject to the reproach of Matthew Arnold 'Our inequality materializes our upper class, vulgarizes our middle class, brutalizes our lower'

## §2 EXTENT OF EQUALITY IN MODERN STATES

Modern States in general recognize civil equality. No man is above the law, and no man is punishable except according to law. The equality of citizens before law is secured above all by judicial impartiality; this in turn is sought to be secured by the independence of the Judiciary<sup>1</sup>. There are some apparent exceptions and limitations to equality before law, but, as will be seen later,<sup>2</sup> the exceptions are generally justified by public considerations. The exceptions are

(i) In some States, like France, there are special courts for the trial of government servants for mistakes committed in the discharge of their official duties.

(ii) Even in States where there is no regular system of administrative jurisprudence and the 'rule of law' prevails, as in Britain, a new type of administrative court has been coming into existence to meet some felt need.

(iii) The State itself, as a collective entity, is not liable in tort, on the principle that the Crown can do no wrong.

(iv) In India, the Governor-General and provincial Governors are exempt from the jurisdiction of ordinary courts, and revenue cases cannot be tried before ordinary courts.

The one great practical limitation to equality before law arises from disparity in income, which is so marked a feature of modern economic life. Inequality of wealth reacts on civil equality: the richer man is obviously in a better position to meet the expenses incidental to successful litigation, e.g. engaging competent counsel. Truly, as Laski says,<sup>3</sup> there seems to be one law for the rich and another for the poor whenever the preparation of a defence is an item of importance in the case. It is, however, difficult to see how this defect can be removed so long as there are inequalities in the distribution of wealth and

<sup>1</sup> See above, ch. VI, §4 (ii).

<sup>2</sup> See below, chs. XVI, XVII and XXII.

<sup>3</sup> *A Grammar of Politics*, pp. 564ff.



so long as better remuneration can command better talent, though obviously it can be mitigated by a reduction in the disparity of incomes

The exceptions and limitations (both legal and practical) are more marked in the political sphere. Political equality demands adult suffrage, the equal right of all adults to stand as candidates for election and equal eligibility to government office

(i) In some States (France and Switzerland, for instance) women are not given the right to vote. Where adult suffrage prevails, this inequality obviously does not exist. The exclusion of minors, lunatics, and criminals is clearly reasonable.

(ii) Plural voting, recognized in Britain among other States, is another infringement of the principle of political equality. Thus an elector may vote in one constituency as a resident and in another as an occupier of land or business premises; or an elector may have a second vote as the holder of a university degree. In India an elector may vote in a territorial constituency, as a member of a recognized Chamber of Commerce and in a university constituency. Plural voting is, however, the exception rather than the rule.

(iii) In India political rights are conditional on the possession of a prescribed amount of property, the payment of tax, or the possession of a prescribed educational qualification. One of the main reasons for prescribing such qualifications was the administrative difficulty of managing the large electorate which would result from the introduction of adult suffrage.

(iv) Elsewhere, in South Africa and some of the states in the U.S.A., national and racial minorities like Indians and Negroes, are not given equal political rights with the 'true' nationals.

(v) In some States a higher age qualification is prescribed for the membership of legislative bodies, for instance, in the U.S.A. only those who are over 25 years old can stand for election to the House of Representatives, in France only those who are over 40 years old can be members of the Senate. This restriction in so far as it is based on a natural inequality cannot be considered unjust.

(vi) In Britain a hereditary second chamber is a relic of political privilege; it may, however, be argued that it has been rendered innocuous by the reduction of its political powers.

(vi) In modern States there is a decided tendency to make the exercise of political rights independent of religious creed, but the weightage allowed to communities in India in representation in the Legislatures, necessary in the circumstances, is a clear infringement of the principle of equality

The inequalities recognized by law apart, there is one considerable factor which results in the unequal influence exercised by citizens on their Government, viz money-power in politics<sup>1</sup> This influence may be traced in (a) the corruption of members of Legislatures, administrative officials and judges, (b) elections, and (c) the practice of lobbying, i.e. bringing influence to bear on members of Legislatures to vote for or against a bill Money-power is formidable especially because it works secretly

And, finally, economic equality Here the disparity is most marked It is true that every State has been attempting in varying degrees, especially by the application of the progressive principle in taxation and by social legislation, to reduce economic inequalities<sup>2</sup> Nevertheless, great inequalities still continue It has been calculated<sup>3</sup> that in India 1% of the community enjoy more than a third of the national wealth, while two-thirds get per head half the average income, and in Great Britain 10% of the population receive appreciably more than half the national income, the other 90% must live upon less than half the national income The distribution of property in Britain is even more unequal 10% of the adult population own more than 90% of the property, while 10% of the population own about 60%

### §3 EQUALITY AND LIBERTY

There are two views among political thinkers on the relation between equality and liberty, one that they are antithetic, the other that they are complementary Lord Acton may be taken as representative of the first The passion for equality, he says,<sup>4</sup> 'made vain the hope of freedom' This is true if freedom is interpreted in its absolute sense to mean that every individual shall be free, according to his opportunities, to satisfy *without limit* his appetite for wealth and power Equality is unattain-

<sup>1</sup> See, on this point, J Bryce, *Modern Democracies*, Vol II, ch LXIX

<sup>2</sup> See below, p 101, and the references cited therein

<sup>3</sup> K T Shah in *The Economic Background*, Oxford Pamphlets on Indian Affairs No 3, and E F M Durbin, *The Politics of Democratic Socialism*, p 85

<sup>4</sup> *The History of Freedom and other Essays*, pp 57-8

able under conditions of such unrestricted freedom. It is a lesson of history that when the freedom of individuals to do what they please is not checked, the clever and more capable will use their freedom to concentrate all wealth and power in themselves to the misery and oppression of the rest. The achievement of any measure of equality therefore demands 'the deliberate acceptance of social restraints upon individual expansion. It involves the prevention of sensational extremes of wealth and power by public action for the public good'. Hence liberty and equality appear antithetic to each other.

But, realistically considered, 'a large measure of equality so far from being inimical to liberty is essential to it,'<sup>1</sup> and vice versa. Freedom is catholic, it is to be enjoyed by all, not by the few alone. And whatever else it involves,

'it implies at least, that no man shall be amenable to an authority which is arbitrary in its proceedings, exorbitant in its demands, or incapable of being called to account when it abuses its office for personal advantage.'

These elements of civil and political freedom have partly been secured by civil and political equality: equality before law, and a certain minimum share for everyone in government. Freedom will have a better content, too, if a measure of economic equality, in the sense which we have indicated earlier, is attained. For there is no denying the fact that the concentration of wealth in the few enables them to put their civil and political freedom to better use than others. Equality in justice is a primary condition for attaining civil freedom, but as has been pointed out earlier,<sup>2</sup> 'the inability of a poor person to employ a counsel, still more to employ really skilful counsel, is a fatal bar to his obtaining justice'. Similarly, the influence of money in politics makes the share of the poor in government all but a mockery. Civil and political freedom will be more real for the masses if there is less economic inequality. Indeed, 'if liberty means the continuous power of expansion in the human spirit, it is rarely present save in a society of equals. Where there are rich and poor, educated and uneducated, we find always masters and servants' (Laski). That is why Rousseau insisted<sup>3</sup> that liberty cannot exist without equality.

<sup>1</sup> R. H. Tawney, *Equality*, p. 245.

<sup>2</sup> *The Social Contract*, p. 46 and n. 1.

<sup>3</sup> See above, ch. VII, §2.

'Allow neither rich men nor beggars', said he 'These two estates, which are naturally inseparable, are equally fatal to the common good, from the one come the friends of tyranny, and from the other tyrants. It is always between them that public liberty is put up to auction, the one buys, and the other sells'

The converse proposition, that a large measure of freedom is essential to equality, is no less true. For political freedom has as a matter of fact been used to reduce economic inequalities. Thus in England, after 1832, social legislation in its manifold forms—unemployment and health insurance benefits, old-age pensions, the provision for the treatment of the sick, free education and the increase of amenities in general—has improved the lot of the common man in terms of vitality and happiness, giving him a longer life as well as more energy during life. The result is that the main body of the working classes is absolutely (and relatively to the propertied classes) a good deal better off in terms of material well-being than it was a century ago, before the advent of democracy. And the limit of improvement in the direction of a greater equalization is not yet reached<sup>1</sup>

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<sup>1</sup> See A Appadorai, *Revision of Democracy*, pp 15-18

## CHAPTER VIII

# THE SPHERE OF THE STATE

### §1 ANCIENT AND MEDIEVAL VIEWS

One of the most difficult problems which the student of political science has to solve is that of determining (to use the words of Edmund Burke) 'what the State ought to take upon itself to direct by public wisdom, and what it ought to leave, with as little interference as possible, to individual freedom'. In an earlier section, we pointed out that, in our view, there is a distinction between State and society, this means that there are limits to State action. This, however, has not always been the view among the peoples of the world. Among the Greeks, for instance, according to Bluntschli, 'the State was all in all. The citizen was nothing except as a member of the State. His whole existence depended on and was subject to the State'. The ancient idea of the State embraced the entire life of man in the community, in religion and law, morals, art, culture and science. Well might Burke's description of the State be applied to it. 'a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection'. The State's end being the comprehensive one of securing a good life for all citizens, all forms of control calculated to secure that result were considered proper, and no line was drawn between matters political, moral, religious or economic. The State might control trade, prescribe occupations, regulate religion or amusements. To the ancient Greek, the city was at once a State, church and school. In other words, the Greeks made no difference between State and society.

Sidgwick, however, contests this view.<sup>1</sup> He says that outside Sparta (and if we put aside the regulation of religious ceremonies and military service), the practical difference between ancient and modern conceptions of the function of government in ordinary civil life and transactions is not very great. He points out that 'when we look through the list of actions, public and private, or the list of officials at Athens, or the offices treated as

<sup>1</sup> H. Sidgwick, *The Development of European Polity*, ch. XII

normal by Aristotle, we find no sign of any excessive *réglementation*. We hear of controllers of markets, whose business it was to prevent fraud and disorder, of commissioners of the city

who had to prevent private houses from encroaching on the public streets'. But the prevention of fraud, disorder, and encroachment on public streets is one of the elementary functions undertaken by modern Governments. Briefly, ancient Governments were not as omnipotent as they are made out to be.

Perhaps it is better to say, with Barker, that the individual was not regarded as having rights of his own, to be protected as against the State. The mark of the Greek State is rather a desire for the action of the State and an attempt to stretch the lines of its action than any definition or limitation of the scope of its interference.

The Romans adopted the Greek conception of the State with some modifications. They 'left very much to social customs and to the religious nature of man. The Roman family was more free as against the State'. This does not mean that the Roman State was less powerful in theory, no one could resist the State if it uttered its will. Rather, the Roman State limited itself, it restricted its own action.

In the Middle Ages, two new forces, the growth of Christianity and the rise of the Teutonic races, brought into prominence a different conception regarding the sphere of the State. It was held 'that the whole religious life of the community, although not altogether withdrawn from the care and influence of the State, was yet essentially independent,'<sup>1</sup> and should be regulated by the Church.

It took some time for the new idea to prevail, indeed, a struggle had to be waged by the Church against the State to get the idea accepted. The State was now only 'a community of law and politics, no longer also of religion and worship'.

Secondly, only with reluctance does the Teuton submit himself to the sovereignty of the whole body. He 'claims for himself an inborn right which the State must protect, but which it does not create, and for which he is ready to fight against the whole world, even against the authority of his own Government. He rejects strenuously the old idea that the State is all in all.'<sup>2</sup> To him individual freedom is all-important. The rights of the

<sup>1</sup> Bluntschli, *The Theory of the State*, p. 41

<sup>2</sup> *ibid*, pp. 43-4

State are thus limited by the rights of the individual as well as by those of the Church

Thirdly, the Middle Ages were pervaded by the feudal conception. Men became sovereigns by virtue of owning land. The functions of government under such a system were simply the function of proprietorship, of command and obedience. Government was for the most part divided out piecemeal among a thousand petty holders. The dispersal of governmental power among a considerable number of persons gradually gave rise to the idea of the rights of individuals against a central authority.

## §2 THE EARLY NINETEENTH CENTURY

In the early nineteenth century, the prevalent view was what is generally known as individualism or *laissez-faire* the sole duty of the Government is to protect the individual from violence or fraud. That Government is best which governs least. As John Stuart Mill put it in his essay *On Liberty*

'The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign'

According to this theory, the following functions of government alone would be proper — (i) to secure to the individual the right of personal security including security of health and reputation, the right to private property together with the right of freely transferring property by gift, sale or bequest and the right to fulfilment of contracts freely entered into, and (ii) to protect the individual from foreign aggression. Briefly, the State was to be a 'negative' or 'police' State

Such important functions undertaken by modern States as the provision of education, poor-relief, and unemployment insurance, the regulation of public health, and aid to agriculture and industry, which in fact make the modern State a social service

State, were considered improper. The theory was justified on psychological, economic and biological grounds.

The psychological argument is a simple one. Individuals may be expected in the long run to discover and aim at their own interest better than a Government can do it for them. Self-help is the best help.

On economic grounds, it pays to let the individual alone. The individual requires a steady supply of good commodities and services at a cheap price. This requirement is best satisfied under conditions of free competition, for the consumers, seeking their own interest, will create an effective demand for commodities and services, producers, seeking their own interest, will meet this demand. Competition among consumers and producers will keep prices at a reasonable level and ensure quality.

From the biological point of view, the fittest will, and ought alone to, survive. That is the natural law. Besides, the health of the social, as of the natural, organism depends on the observance of the law of specific function—that every part should do that function for the performance of which it has been intended by nature. Government 'is a joint-stock company for mutual assurance', its natural function is to hinder hindrances. Its interference in any other aspect of life is unnatural and socially harmful.

*Laissez-faire* was popular in England approximately from 1750 to 1850. This popularity was due partly to the failure of the older policy of mercantilism and partly to the Industrial Revolution. Mercantilism meant wellnigh complete Government control over trade, commerce and industry. By 1780 with the loss of the American Colonies, this policy had become discredited. The tremendous leap forward in industry as a result of the introduction of mechanical power and the factory system did away with the necessity for the subsidies and protective measures of mercantilism. It was now felt that non-interference by Government in industry and trade would enable the leaders of industry to take the maximum advantage of the new inventions, and lead to an enormous increase in national wealth. The Government, by a series of laws, therefore relaxed its control over trade and industry.

1784-6 The reduction of tariff duties

1796 Relaxation of Navigation Laws in favour of the  
United States of America



- 1813 The trade to India was thrown open
- 1846 Repeal of the Corn Laws
- 1849 Repeal of the Navigation Laws

The *immediate* result of *laissez-faire* was that it led to an enormous expansion in trade and industry, and, indeed, seemed to justify its adoption

### §3 THE PASSING OF LAISSEZ-FAIRE

In the long run, however, *laissez-faire* proved disastrous to the community: its social cost outweighed its economic gains. Long hours of labour, inadequate wages, overcrowded factories, and insanitary arrangements—these were the lot to which the workman had to submit ‘I have worked till 12 p.m., last summer, we began at 6 I told book-keeper I did not like to work so late, he said I must We took our breakfast and tea as we could, a bite and a run, sometimes not able to eat it from its being so covered with dust’ Such is the recorded evidence<sup>1</sup> of one of the factory workers of those days Children too were overworked

‘The parent who would endeavour to realize the life of a factory child in 1832’, writes Walpole,<sup>2</sup> ‘should try to imagine his own little boy or girl—eight or nine years of age—working in a factory He should try to recollect that it would be his duty to rouse the child on a cold winter’s morning at five that it might be at its work at six, that, day after day, week after week, month after month, it would be forced to rise at the same hour; that with two short intervals of half an hour each, it would be kept to its dull employment for thirteen hours every day, that during the whole of that time it would be breathing a dusty, unwholesome atmosphere, rarely able to relieve its limbs by sitting down.’

This social misery was directly due to certain unforeseen but inherent defects in the policy of non-interference That policy, in Joad’s analysis, wrongly assumes that each individual is equally farsighted and has an equal capacity for knowing what he wants, that each individual possesses an equal power of obtaining what he wants and has an equal freedom of choice under free competition, and that the satisfaction of the wants of all individuals is identical with the well-being of the community Briefly, it forgot two elementary propositions

<sup>1</sup> Quoted by F. R. Woots in *Modern Industrial History*, p. 77

<sup>2</sup> Sir Spencer Walpole, *History of England*, Vol. III, p. 201, cited by F. R. Woots, *op. cit.*, p. 79

(1) Free competition can lead to the best social advantage only where there is approximate equality of bargaining power As it was, 'free cōmpetition' was free in name only, the employers with their immense resources could in effect get their terms accepted by the starving wage-earners, for the latter, the freedom to reject the terms offered meant little more than the freedom to perish. It is the duty of society to moralize competition.

(2) Social organization can supply a much needed corrective to the ignorance and self-interest of individuals In Joad's expressive phrase, economic action is 'blind', that is to say, the economic activities of individuals, concerned as they are with individual ends, often lead to results which are willed neither by society nor by any individual To cite an example: if there is a rumour that a bank is in difficulties, depositors are anxious to withdraw their money, there is a run on the bank and the bank fails—a result 'which nobody wants, is nevertheless due to what everybody has individually willed'. Society, through its Government, can regulate economic action in the interest of social good. It can supply knowledge and foresight to mitigate the hardships of blind action and promote social welfare. An example in point is the salutary effect produced by the social organization of agricultural marketing in India. Government has clearly helped to put the farmer in possession of better value for his goods by timely intervention.

Gradually, every State began to realize the folly inherent in laissez-faire and to assume greater responsibilities, particularly in the economic field Factory Acts, Mines Acts, Trade Board Acts, Shop Hours Acts and similar laws were passed. Thus laissez-faire passed away.

While *laissez-faire* is clearly a fallacious theory, its merits should not be ignored. It teaches the wholesome lesson, so necessary as a set-off to current totalitarian ideas, that too much Government help (maternalism) and too much State regulation (paternalism) are bad. It teaches the value of self-help and reliance. to kill individual initiative is, as the saying goes, to kill the goose that alone can lay golden eggs. Social action, while achieving social ends, should encourage individual initiative, because it is a great social asset.

While there is general agreement in rejecting the conception of *laissez-faire*, such agreement is wanting in deciding on the positive limits of political control. One view is the socialistic one, which is discussed later.<sup>1</sup> Another is the totalitarian conception of the State. 'Nothing beyond the State, nothing against the State, nothing outside the State' This, however, is an extreme view, which is considered in general to be inimical to liberty.

More generally, it is agreed that it is the State's duty to promote the greatest happiness of the greatest number. The State is an organization to promote social good on the largest possible scale. And in attempting to achieve this purpose, the tendency is for Governments to make themselves more and more conspicuous.

(i) *Personal security*. Admittedly Government aims, first, at assuring to the individual personal security, and protecting the whole State from foreign aggression. To achieve this aim, it defines and punishes crime, administers justice, maintains the police and the fighting forces, and conducts dealings with foreign States.

(ii) *Property*. It protects the right to private property, together with the right to the free transference of property by gift, sale or bequest, it also enforces the right to fulfil contracts freely entered into.

(iii) *Political rights and duties*. It determines the political rights and duties of citizens, passes laws to regulate voting and delimits constituencies.

(iv) *Education*. There is a tendency to enforce compulsory elementary education and to supervise and aid secondary and higher education.

(v) *Family*. The family is a natural institution required by the needs of man. It may well be said to be the nursery of the State, as the moral and intellectual training of society very much depends on it. The modern State exercises a certain control over its exterior aspect, generally insisting on conformity to the prevailing type of marital union, prescribing limits of kinship within which marriage is prohibited, regulating divorce and making rules regarding inheritance. A few States encourage marriages by providing financial aid, some insist on certain health and age requirements as conditions of marriage, nearly all States have regulations to ensure the protection and care of children and to

safeguard wives against non-maintenance and other economic consequences of desertion, and generally provide institutions to meet those cases where the family fails in its task of rearing its young. There is a tendency for the State to take over, by the provision of hospitals, old-age pensions, insurance schemes and by free compulsory education, the obligations which formerly fell upon the kin

(vi) Industry The tendency towards increased State interference is particularly manifested in industry. This interference is effected with a view to protect (a) the home manufacturer, (b) the worker, (c) the consumer, and (d) the investor

(a) State help to industry in the form of protective duties is generally advocated and given. First, it is argued, as against the Ricardian theory, that every State should have a certain amount of economic independence or self-sufficiency, especially in times of war. Secondly, there is the infant industry argument the natural resources and circumstances of a country may be such that while the initial cost of starting and establishing certain industries may, in the face of foreign competition, be great, such industries, once established with State protection, may well be able to stand foreign competition. The story of discriminating protection in India, particularly as applied to the iron and steel industry, is a clear instance of this. Thirdly, it is believed, whatever economists may say, that protection will partly solve the problem of unemployment

(b) The State's attitude towards industrial labour is no longer one of individualism. The Factory Acts contain provisions for fire escapes, the fencing of machinery, ventilation, etc., they regulate hours of labour for men, women and children, besides prescribing rest intervals and holidays and fixing the minimum age for children to enter factories. Similarly, various Acts regulate the conditions of employment in mines. The laws regulating trade unions and trade disputes, the system of compulsory insurance and old-age pensions and Workmen's Compensation Acts, now operative in various countries, further demonstrate the solicitude of Governments for the welfare of labour.

To illustrate <sup>1</sup> In India the Factories Act of 1934 prescribes a daily limit of 10, and a weekly limit of 54, hours of labour in

<sup>1</sup> See G. B. Jathar and S. G. Beri, *Elements of Indian Economics*, 3rd ed., pp. 90-1

'perennial' factories. The maximum hours of work for children are 5 per day. Rest intervals, a weekly holiday, and necessary conditions with regard to ventilation, light, temperature, sanitation and safety are also insisted on. In some provinces, e.g. Madras, special Maternity Benefit Acts have been passed to provide leave of absence (with a wage or allowance) to women for some months before and after confinement. The Workmen's Compensation Act (1923) and the Payment of Wages Act (1936) are other important laws; the former regulates the compensation to be paid by employers for certain kinds of injury or death arising from employment, the latter, the periods of wage payment and deductions from wages.

(c) To protect the consumer, the State interferes with competitive prices. The old idea that prices should be left altogether to the play of free competition among buyers and sellers has been found to be productive of serious injustice to the buyer due to the increasing prevalence of monopoly. The State therefore regulates trusts and cartels, fixes standards of weights and measures, passes anti-adulteration laws and encourages the consumers' co-operative movement. In war-time, Governments everywhere have passed laws to prevent profiteering and the hoarding of essential commodities like rice, and have even introduced, where necessary, schemes of rationing in order that the available supply of such commodities is equitably distributed. A special case of the interference of the modern State in regard to prices, as Leacock points out,<sup>1</sup> is seen in legislation concerning railway rates, which are of course prices charged for transportation of persons and freight. The distinctive position which the railways occupy in the industrial world has induced some modern Governments not only to subject them to special regulations, but also, as in India, to own and operate railways. Similar considerations apply generally to other public utilities, like electricity and gas supply.

(d) To protect the investor, Governments regulate banks and companies.

(vii) *Agriculture* As illustrated below<sup>2</sup> with reference to India, Governments everywhere interfere to protect the tenant from exploitation by the landlord, to help the ryot with cheap credit and marketing facilities and to organize agricultural re-

<sup>1</sup> *Elements of Political Science*, p. 375

<sup>2</sup> §8 in this chapter.

## §5] REASONS FOR INCREASED STATE ACTIVITY

search They also construct, as in India, large irrigation works to help the ryot

(viii) *Other functions* Besides the above-mentioned functions, modern States maintain sanitation and health departments, looking to drainage and hospital relief, aiding the poor and the incapable by maintaining workhouses and institutes for defectives They also undertake those functions which obviously fall outside the sphere of the individual, such as the control of currency and credit, the postal system, the carrying out of surveys and censuses, and the collection and dissemination of data of various kinds

(ix) *Distribution* There is, finally, the social control of distribution The State endeavours to direct wealth into new channels as it is produced by seeing that the daily result of production goes into the pockets of those who have so far been receiving less than they should This is done partly by the regulation of profits and wages, and partly by taxation. The progressive principle of taxation, generally adopted by the modern State, enables it to take wealth from those who have it and transfer it to others either by direct payments (old-age pensions, unemployment allowances, etc) or by the provision of communal enjoyments (such as free education, free libraries, parks, hospitals, etc)

To summarize the modern State is a social service State, a positive State as compared with the police or negative State of the *laissez-faire* conception It properly intervenes to uphold social standards, to prevent exploitation and manifest injustice, to remove the needless hazards of the economic struggle and to assure and advance the general interest against the carelessness or selfishness of particular groups

## §5 REASONS FOR INCREASED STATE ACTIVITY

The increased activity of the State in modern times may be explained by the following reasons

(i) The nature of economic life since the Industrial Revolution The most outstanding social result of the Industrial Revolution has been the introduction of large-scale production in factories This, in its turn, has brought about a fundamental change in world economy For mass production has meant a distance between the producer and the consumer, between the

employers and the employed, and between the company-promoter and the investor ; the human element in all these relationships tends to be ignored The possibilities of fraud and of exploitation are increased, necessitating increased State intervention to protect the weak and the exploited Again, mass production necessitates wide and ever-expanding markets abroad ; the interdependence between State and State in capital, market, and labour becomes marked, and without the help of the State the industrialist is unable to make the maximum profit Further, unemployment is implicit in a system where the production is dependent upon the anticipation of a demand which is affected by world factors , frequent crises are the result , the State has to attempt to mitigate the social evils of unemployment.

(ii) The growth of monopolistic corporations The rise of trusts and cartels, which virtually introduces an element of monopoly in trade, increases the necessity for the State to safeguard the interests of the consumer and the worker.

(iii) The failure of laissez-faire *Laissez-faire* has been weighed in the balance and found wanting

(iv) The political enfranchisement of the working classes. In the nineteenth century, the vote was extended to larger and larger numbers of people. The political value of the vote was not lost on the enfranchised people , they naturally returned people to Parliament who were pledged to support all measures calculated to achieve a better distribution of wealth The formation of the Labour Party in Britain, and similar socialistic parties elsewhere, has given a fillip to State action

Paradoxically, the failure of democracy and the rise of totalitarianism in States like Germany and Italy have brought about a similar result in those countries

(v) The Great War The war of 1914-18 accustomed men to greater State interference in their lives ; the habit of acquiescing in such interference has helped such interference to continue.

(vi) Political theories. The influence of radical political theories, like socialism and communism, has been pronounced. They point to evils to be remedied and maladjustments in economic life to be adjusted. The Government has necessarily to act to remedy the evils, which are pointed out with obvious sincerity both within the Legislature and outside, by socialists

Education comes within the sphere of the State because (i) popular education is necessary for the preservation of those conditions of freedom, political and social, which are essential to free individual development. It is necessary to fit the citizen for the tasks of citizenship. Further, the great social problem of our day, the reduction of inequalities, is largely a question of the provision of adequate opportunities, which, again, is largely dependent on education. (ii) No machinery less extensive in its power than Government can secure popular education.

There are three possible ways by which the State may ensure to every child the necessary minimum of education. First, it may leave the education of the child to the care of the family. Second, it may command that every child should receive a certain minimum of education as a legal right and compel the family to provide it out of the family funds. Third, it may order that every child should have schooling up to a certain age, and make education free, providing the necessary funds from its revenues. The tendency in modern States is to adopt the third method, for experience has shown that the first two do not achieve the desired result.

In India, compulsory and free elementary education remains a distant ideal. It is true that even as early as 1904 the Government of India had gone so far as to 'fully accept the proposition that the active extension of primary education is one of the most important duties of the State'. That they have not appreciably succeeded in such extension may be seen from the fact that at present only 14% of the boys and girls of school-going age are under instruction.<sup>1</sup> Finance is the greatest stumbling-block. The memorandum recently prepared by the Educational Adviser to the Government of India estimates the cost of a system of universal, compulsory and free education for all boys and girls between the ages of 6 and 14 for British India alone at Rs 200 crores a year. In view of the fact, however, that education is a great social investment, funds must be found and every effort should be made to attain the ideal within a measurable period of time. A study of the education budgets of progressive countries is an eye-opener in this regard. The educational expenditure per head

<sup>1</sup> *The Educational System*, Oxford Pamphlets on Indian Affairs No. 15



in England is Rs. 32-2-0, there is no good reason why in India it must be as low as 8 as 9 ps

The first task, then, of the Governments<sup>1</sup> in India is to increase literacy by the gradual application of the principle of compulsory and free elementary education, the second is to see that with lavish expenditure on education is secured an increased return in educational value. Mere quantitative expansion, in other words, is not enough, it must be accompanied by the prescription and enforcement of proper standards in respect of staff, equipment, etc.<sup>2</sup> It is not necessary that the State should directly run all the schools, the system of grants-in-aid and the provision of an efficient inspecting agency will secure the object. Where local bodies run the schools, Governments have a particular duty to see that the schools are properly managed.

Somewhat different considerations apply to secondary and higher education. Secondary education obviously cannot be made compulsory or free, there are far too many practical difficulties for such a task to be attempted. The best that the Governments can do is to make liberal grants-in-aid to schools managed by private agencies and local bodies and to insist that the money be spent properly. Higher education is also important as a preparation for political leadership and for administrative duties. Here the duties of the State in India appear to be to provide financial help, consistent with its more onerous obligations in respect of elementary and secondary education; to lay down the necessary framework of university bodies, and, having done this, to allow the universities the largest possible internal freedom, and to provide facilities to bona-fide students for research in the Government record offices.

Finally, there is the important problem of adult education. Its magnitude can be seen from the fact that in India 880 people out of a thousand are illiterate. Governments could do a lot to wipe out adult illiteracy by, first, realizing the urgency of the problem, second, enlisting the co-operation of non-official

<sup>1</sup> We say 'Governments' because under the present constitution, education is largely the concern of provincial Governments.

<sup>2</sup> The Sargent memorandum (*Post-War Educational Development in India*, 1944) referred to in the text contains useful suggestions on this as on other aspects of educational policy. Enlightened public opinion must insist on this memorandum being made the basis of a national system of education for India as early as possible.

agencies, third, making liberal grants-in-aid and, finally, making available such expert advice as is necessary.

The Central Government in India performs a useful service in maintaining a co-ordinating agency in its Central Advisory Board of Education. This Board serves to bring educational experts from various provinces together to compare notes and consider how best improvements can be effected in the system of education.

### §7 PROHIBITION

The issue of prohibition came to the forefront in Indian politics after the Congress party secured majorities in the Legislatures of seven provinces in India in the elections of 1937, for, among the first social reforms attempted by the Congress ministries was the introduction of prohibition, i.e. the prevention by law of the manufacture, sale, or use of intoxicants. Madras was the first province to introduce it (1938).

Social legislation of this magnitude naturally met with some opposition. The arguments against prohibition may be summarized thus:

(i) Prohibition is difficult to enforce. The instance of America which introduced prohibition in 1920 and revoked it in 1933 is a warning. That instance shows indeed not only that it is difficult to enforce, but that it creates a widespread habit of disobedience to law, which offsets any advantages it might otherwise have.

(ii) It involves great financial loss, and that in a double sense. Its enforcement is costly, needing as it does an extra police force; it also means the loss of considerable revenue. The revenue from excise is, next to land revenue, the biggest item in provincial revenues, and, in view of the urgent need for funds for the nation-building departments, should not be forgone, especially at the present stage of Indian economic development.

(iii) It is an unwarranted interference with the freedom of the individual. Man cannot be made moral by Act of Parliament.

(iv) It creates unemployment among that section of the population which lives by supplying 'drink', such as tappers, toddy-sellers, etc.

But, in favour of prohibition, it is rightly argued

(i) Drink is an evil both from the individual and social points of view. Alcohol is bad for the health of the individual

Socially it is undesirable because it results in a larger number of crimes and increases the poverty and misery of the masses. Family life is often unhappy not only because womenfolk are beaten by drunken husbands, but the money which ought to be spent in supplying the needs of the family is spent on drink.

(ii) In India, prohibition is not difficult to enforce, because the religious sentiment of the country is against drink. The lesson of America does not apply *in toto* to India, in Western countries, unlike India, drink is an integral part of ritual and food.

(iii) The revenue from drink is immoral. Alternative sources of revenue, such as the sales tax, can be found. Retrenchment also can be resorted to.

The experience of the working of prohibition in those districts in Madras where it was in force from 1938-43 does not help the student to arrive at a final judgement. The reports issued by the Government, as well as by impartial investigators sent out by universities (1938-40), showed that prohibition was a great boon to the masses. It resulted in great economic and social improvement. Family life was happier and there was less crime. People ate better and more food, women and children had better clothing. But from 1940 onwards reports were less optimistic. Cases of breaches of the law were on the increase. The Government in power, therefore, felt that it was difficult to enforce the law and suspended it from 1 January 1944. It is too early to conclude from this experiment that prohibition cannot succeed in India. The lesson rather is that prohibition, to be successful, requires enforcement for a long time, at least two generations, and demands incessant vigilance on the part of the administration as well as the enthusiastic co-operation of the general public, particularly in detecting law-breakers.

## §8 THE STATE AND AGRICULTURE IN INDIA

The general principles of State interference which we have laid down earlier apply to agriculture as well, i.e. the State properly intervenes to prevent exploitation and manifest injustice, and by placing the resources of the State at the disposal of the individual helps to remove the needless hazards of the economic struggle. As the Royal Commission on Agriculture put it concisely, the aim of the Government's agricultural policy must be to help to establish a smiling and happy countryside.

## §8] THE STATE AND AGRICULTURE IN INDIA

Four main lines of government activity are noticeable in regard to agriculture

(i) *The promotion of scientific agriculture* This is mainly the function of the provincial Departments of Agriculture, acting in co-operation with the Imperial Institute of Agriculture at New Delhi (maintained by the Central Government), the Imperial Council of Agricultural Research, and the Veterinary Departments. Their methods are (a) Research, with the object of introducing new crops, manures, implements and methods of cultivation and of improving indigenous types, destroying insects that are a pest to crops, and breeding superior types of live stock (b) Propaganda, with the object of inducing the cultivator to adopt the results of research. This takes several forms—demonstrations at experimental farms, or on the cultivators' own land, lectures, pamphlets, and the distribution of the new varieties of seeds, manures and implements (c) Agricultural education through the establishment of agricultural schools and colleges

(ii) *The organization of rural credit* In India, as elsewhere, the problem of indebtedness is a vital one. Those who help the agriculturist to get cheap credit for necessary purposes help him to get a better net return from his land. This has been mainly attempted through the organization of co-operative credit societies and land mortgage banks, the former supplying short-term and the latter long-term credit. The history of the co-operative movement in India starts with the passing of the Co-operative Credit Societies Act of 1904, the Act has since been amended in several respects, several defects have been discovered in the working of the societies and attempts have been made to remove them. In this context it is sufficient to say that the Government in India, in the early stages of the movement, supplied not only the much needed initiative, but also provided an official inspecting agency to direct the movement on right lines and to audit the accounts of societies.

(iii) *The protection of the tenant* A series of Acts have been passed since 1859 in order to protect the tenant against exploitation by the landlord. The general features of this legislation are <sup>1</sup> (a) There is a limit to the enhancement of the rent both as regards the amount and the period which must elapse before rent can be increased. Thus in Bengal enhancement can

<sup>1</sup> G. B. Jathar and S. G. Beri, *Indian Economics*, Vol. I, 6th ed., pp. 417-18

occur only as a result of agreement and cannot be more than two annas in the rupee (b) The tenant cannot be ejected at the will of the landlord for frivolous reasons (c) The occupancy right is hereditary and can only be alienated on certain conditions. (d) The payment of rent can be demanded only by instalments (e) Remissions and suspensions of land revenue granted by the Government to landlords must be followed by corresponding concessions to tenants from landlords (f) The right to make improvements on land without enhancement of rent is protected within certain limits

(iv) *The organization of marketing* On account of his chronic indebtedness and need for money, coupled with the lack of storage facilities, the Indian cultivator is normally compelled to sell his produce to middlemen at a time when prices are low. The provinces have recently begun to encourage the formation of regulated markets and co-operative sale societies with the object of enabling the farmer to realize a better price for his goods. The Government of India have appointed a marketing expert on the staff of the Imperial Council of Agricultural Research. Marketing officers have been appointed by provincial Governments to conduct marketing surveys of the principal crops in the different provinces. To secure the proper grading of agricultural produce, an Agricultural Produce (Grading and Marketing) Act has been in operation since 1937.

Many other improvements are necessary if the object of promoting a smiling countryside is to be achieved. *The Report of the Royal Commission on Agriculture in India* (1928) is a mine of valuable suggestions in regard to legislation designed to promote the consolidation of holdings, measures to prevent the spread of contagious cattle diseases and for protection against insects and pests, and the re-examination and readjustment of railway freights on fodder, fuel, timber and agricultural implements. For detailed information the interested student is referred to the accounts of periodical surveys carried out by the Government of India on the lines suggested in the *Report*.

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## MODERN THEORIES OF THE STATE

## §1 SOCIALISM

(Socialism may be defined as a theory and a movement aiming at the collective organization of the community in the interests of the mass of the people through the common ownership and collective control of the means of production and exchange Its essentials, according to Morrison,<sup>1</sup> are that all the great industries and the land should be publicly or collectively owned, and that they should be conducted (in conformity with a national economic plan) for the common good instead of for private benefit These points need some explanation)

It is important to observe that socialism, as an economic and political theory, originated as a protest against the evils of capitalism Capitalism may be defined as an economic system in which private persons are permitted (under regulations laid down by the State), to undertake enterprises, providing or borrowing the necessary capital, and taking the profits, if any, after all the costs of the enterprise have been met Its essentials are the private ownership of the means of production, private enterprise and private profit or unlimited acquisitiveness as a motive in individual life Experience has shown that capitalism has several defects (i) It results in an unjust distribution of the national wealth, i.e. in *inequality* of wealth, income and opportunity (ii) It results in *insecurity* also This is a direct consequence of the wage system, which is implicit in capitalism The wage system, according to G D H Cole,<sup>2</sup> abstracts labour from the labourer, so that the one can be bought and sold without the other Consequently wages are paid to the wage worker only when it is profitable to the capitalist to employ his labour The periodical breakdown of the economic system, with its inevitable consequences of unemployment and misery, is the result (iii) The wage system results not only in insecurity, but it makes of

<sup>1</sup> *An Easy Outline of Modern Socialism*, p 9, cited by A C Pigou in *Socialism versus Capitalism*, pp 7-8

<sup>2</sup> G D H Cole, *Self-Government in Industry*, pp 78-9

the worker a 'wage-slave', for in return for the wage, he surrenders all control over the organization of production, and all claim upon the product of his labour, the feeling that he is able to express himself in his work is absent (iv) The price system in a capitalist economy responds not to the real needs of the community but to the demands of those who have money to spend Therefore production is for profit, not for use (v) Finally, those who ought to be partners in production, viz the employers and the employed, are, or tend to be, antagonists

Socialists suggest that all these defects of social organization arise from one root cause, viz the private ownership of the means of production and the desire for private profit Therefore they would abolish all forms of private capital—private property in land, natural resources, factories—and with it the incentive to private profit In place of private capital they would substitute common ownership and control Twenty years ago, as A C Pigou points out,<sup>1</sup> socialism was held to include only these two requirements, but recently, as is evident from the definition by Morrison cited at the beginning of this section, there has been an emphasis on central planning as a third requirement of socialism It is increasingly felt that the efficient organization of economic life under a system of public ownership of capital demands a central planning machinery to divert the productive activities of society into the most useful channels, and to increase social good to the utmost There is no doubt that the Russian example has had its share of influence in modifying socialist theory in this direction<sup>2</sup>

Socialists agree on the outline given above, but they are not all agreed on the ideal society they desire to see realized, or on the method of attaining it Broadly speaking, there may be said to be two schools of socialist thought, the revolutionary and the evolutionary The former (communists and syndicalists) hold that revolution or direct action is the only effective method of bringing into existence the new society, the latter (collectivists and guild socialists) believe that evolutionary, constitutional

<sup>1</sup> *Socialism versus Capitalism*, ch I

<sup>2</sup> A good example of the earlier notions of socialism referred to by Pigou is provided by F J C Hearnshaw's description of the essentials of socialism as what may be called the six E's, the exaltation of the community above the individual, the equalization of human conditions, the elimination of the capitalist, the expropriation of the landlord, the extinction of private enterprise, and the eradication of competition



methods are not only possible but have more lasting effects We shall describe these schools of thought in some detail

## §2 COMMUNISM

Karl Marx (1818-83) is generally known as the father of socialism A German by birth, he early displayed signs of intellectual brilliance and took a keen interest in history, jurisprudence, and philosophy He became a severe critic of the existing economic and political order and soon had to leave the land of his birth for France, and later, in 1849, for England There he remained for the remaining thirty-four years of his life, studying and writing He took part in forming a socialist association called the 'International' in 1864, and 'remained thereafter in every way the dominant personality of the socialist movement' His main writings are the *Communist Manifesto* (1848), drafted in co-operation with his friend and collaborator Friedrich Engels, the *Critique of Political Economy* (1859), and *Capital* (1867-94) The theory of socialism which he developed is known as communism

The essential principles of communism, are all found in the *Communist Manifesto* issued in 1848

(i) *The materialistic interpretation of history* The foundation of communism is the belief that the mode of production in material life determines the general character of the social, political, and spiritual processes of life

'In the social production which men carry on they enter into definite relations that are indispensable and independent of their will, these relations of production correspond to a definite stage of development of their material powers of production The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness'

(ii) *The class war* 'Since the establishment of private property, society has been divided into two hostile economic classes Just as in the ancient world the interest of slave-owners was opposed to that of the slaves, and in medieval Europe the interest of the feudal lords was opposed to that of the serfs, so in our own times, the interest of the capitalist class, which derives its income mainly from the ownership of property, is antagonistic to the interest of the proletariat class, which depends for its livelihood chiefly upon the sale of its labour power'

(iii) *The theory of surplus value* The primary reason for this antagonism is that the capitalist class, through its ownership and control of the means of production, is able to appropriate the 'surplus value' which is created by labour and, therefore, ought to go to labour. The surplus value arises because labour power produces values above the cost of tools, raw materials and the cost of its own subsistence. The modern State is but a tool in the hands of the capitalist class to protect it from rebellion by the workers who suffer from this process of exploitation.

(iv) A social revolution is inevitable because the future development of capitalism will take the form of the concentration of capital in fewer and fewer hands, while, at the same time, there will be 'the ever closer and more elaborate organization of the proletariat'. 'At its climax, the proletariat will arise, overthrow the capitalist class and expropriate them of the means of production'.<sup>1</sup>

(v) *The dictatorship of the proletariat* The dominant class will not, however, give up comfort and power without a severe struggle. 'The Red Terror', wrote Trotsky, 'is a weapon utilized against a class, doomed to destruction, which does not wish to perish'. This animal, in other words, is naughty, 'when it is attacked, it defends itself without realizing that its skeleton is needed for a museum of specimens'. To stabilize the results of the revolution, therefore, a dictatorship of the dominant class, viz the proletariat, will confiscate all private capital, organize labour, compel all to work, centralize credit and finance, establish State factories, concentrate means of transport and speed up production. 'The road to socialism lies through a period of the highest possible intensification of the State'

(vi) Ultimately, the State will wither away. After capitalism is completely destroyed, the State is unnecessary, for there will no longer be any capitalists, for whose protection it now exists. Therefore it will 'wither away'.

'When organizing production anew on the basis of a free and equal association of the producers,' wrote Engels, 'society will banish the whole State-machine to a place which will then be the most proper one for it—the museum of antiquities—side by side with the spinning wheel and the bronze axe'.

(vii) The new society will then be organized on the principle,

<sup>1</sup> See C. E. M. Joad, *Introduction to Modern Political Theory*, pp. 44-5.

'from each according to his capacity, to each according to his needs' Each man will contribute to the social wealth by his labour as much as he can, and will take from it what he needs

Every one of these fundamental principles of communism has been subjected to vigorous criticism by students of economics and politics. The materialistic interpretation of history is a partial view, accident, great men, religion and geography have all played some part in history. The idea of a class war, denying as it does the possibility of a common civic consciousness, is unduly pessimistic. The labour theory of value, on which is based the notion of surplus value, is an inadequate explanation. Other factors, such as the relation of supply to demand and the existence of competition or monopoly, must be taken into account. A social revolution of the kind predicted is not inevitable. Recent economic history shows that social thought and foresight has brought about a gradual, and can bring about a further, amelioration of social ills. As a matter of fact, the first socialist revolution did not, as Marx predicted, arise out of the culmination of capitalist development in the West but out of the pre-capitalist system in the East. Indeed, the very idea that a revolution is inevitable acts as a stimulus to prevent its coming.

Further, the dictatorship of the proletariat envisaged during the transition period is clearly undesirable. Any form of dictatorship is defective because we have no assurance that the interests of the dictators will always coincide with the interests of the community.

Communists constantly emphasize the evils of the concentration of wealth, but they are blind to the evils of the concentration of power. Even if the first dictators are high-minded, we have no assurance that their successors will be. Dictatorship is incapable of voluntary abdication, the State will not wither away. And finally the communist goal is not possible of realization, for it demands a revolution in human nature. A social ideal which assumes such a fundamental change in human nature and habits is by the nature of things incapable of realization.

### §3 SYNDICALISM

'Syndicalism' is derived from *syndicat*, the ordinary French term for labour union, and may be defined as 'that form of social theory which regards the trade union organizations as at

once the foundation of the new society and the instrument whereby it is to be brought into being' (Joad) Its home is France, its main exponents are Sorel (1847-1922) and Pelloutier (1867-1901)

The syndicalists accept the general socialist position that society is divided into two classes, the capitalist and the proletariat, whose claims are irreconcilable, that the modern State is a class State dominated by the few capitalists, that the institution of private capital is the root of all social evils and that the only remedy for them is to substitute collective capital in place of private capital

It differs from communism primarily in the method it advocates for achieving the socialist objective That method is direct economic action In contrast to other socialist schools, it stresses the idea that

'the social transformation to be sought by the proletariat must be a self-transformation and that the institutions through which existing society is to be displaced by a new society are institutions that grow out of, and are built up by, the working class through its unaided efforts and in defiance of political authority'<sup>1</sup>

The efficient organization of labour unions, by crafts or industries, and of local labour councils is the first step towards syndicalism The boycott (the refusal to take employment with or purchase articles made by a firm regarded as unfair in its dealings with workers), the label (to indicate work done under union conditions), 'ca'canny' (the practice of doing a minute quantity of work with scrupulous care), sabotage (e.g. the damaging of plant by workmen), strikes, and, on top, the general strike, are the tactics adopted by syndicalists to achieve their ends The general strike does not necessarily mean, contrary to what the term appears to denote, a strike of *all* the workers in a country It is sufficient to have a strike of the workers in the key industries (e.g. electricity, gas, and transport) in order to paralyse economic life and to end capitalism

Regarding the structure of syndicalist society, the syndicalist writers are not clear, they do not, indeed, consider it worth their while to work out the details of a future organization of society There will be no political State, as we understand it, which presupposes an organization in which a delegated minority centralizes in its own hands the power of legislation over all matters

<sup>1</sup> F. W. Coker, *Recent Political Thought*, p. 234

Syndicates of workers will control the means of production, they will only use (not own) such property with the consent of society. They will be connected with the rest of society through local unions of workers and a general confederation of labour. This last will control such national services as railways and the post office. This picture is necessarily incomplete and hazy, only two features stand out clearly: there will be the producers' control of industry, the State will disappear.

No criticism of the ideal of syndicalist society is called for, as that ideal has not been clearly stated by the syndicalists themselves. Of their method, the most cogent criticism is that 'a general strike is unnecessary, because a general election is never far off' — for, given the discipline and the unity which are necessary for a successful general strike, the desired end can be achieved gradually, through constitutional methods. Indeed, the chances of success are greater, and the results more lasting, if they adopt constitutional methods, educate the voters, return representatives to Parliament on the socialist ticket and pass the necessary laws. In a general strike, the working classes are likely to starve before achieving their object, and failure of a strike may produce reaction against the workers. Further, methods like *ca'canny* and sabotage are sure to have a vicious effect on the morale of the workers.

#### §4 COLLECTIVISM

Communism and syndicalism agree in being revolutionary. They advocate 'direct' action, rejecting the use of indirect parliamentary methods for achieving the socialist objective. Collectivism believes in the efficacy of the democratic method for this purpose. It is defined as that policy or theory which aims at securing *by the action of the central democratic authority* a better distribution, and in due subordination thereto a better production, of wealth than now prevails. Its principles are best explained by reference to the ideals of the English school of collectivism, known as Fabian socialism.<sup>1</sup>

The Fabian society was established in January 1884. It has counted among its members many distinguished men and women including Bernard Shaw, Sidney and Beatrice Webb, Graham

<sup>1</sup> Collectivism is more or less equivalent to State socialism or Revisionism.

Wallas, H G Wells, and Annie Besant The name of the society is explained by its motto

‘For the right moment you must wait as Fabius did when warring against Hannibal, though many censured his delays, but when the time comes you must strike hard, as Fabius did, or your waiting will be in vain and fruitless’

The present social organization discloses several defects it assures the happiness and comfort of the few at the expense of the suffering many, it secures political freedom but maintains economic insecurity and slavery, there is ‘poverty in plenty’ The Fabians therefore aim at the establishment of a society in which equality of opportunity will be assured and the economic power and privileges of individuals and classes abolished through the collective ownership and democratic control of the economic resources of the community But it is no use attempting a sudden and radical transformation Society must be ‘permeated’ with socialistic ideas through lectures, books and pamphlets, men who believe in them must be returned to Parliament, and public opinion must urge the adoption of legislative and administrative measures embodying socialistic ideas To start with, the national minimum of work, leisure, wages, security against unemployment and sickness, provision for old age, self-government in industry and education must be guaranteed to all This of course means an extension of the progressive principle in taxation already at work, and the further taxation of inheritances, investment incomes and of unearned increment The public ownership (national and municipal) of public utilities and natural monopolies must be pressed forward, and ultimately the land and all forms of industrial capital must be nationalized

‘The transfer must be effected gradually, applied at any given time only to such industries as can then be successfully administered by the community, and, though without full compensation, yet with such relief to the expropriated individuals as may seem fair to the representatives of the community in the political department’<sup>1</sup>

Briefly, the democratic State is the instrument through which the social transformation is accomplished, the democratic State is also retained in the socialist society in order to be the agent of the community to own capital and regulate production and

<sup>1</sup> Coker, *op cit*, p 105

distribution Socialism, indeed, is viewed as the next step in democracy

The distinction between communism and collectivism must now be clear The former is revolutionary, the latter evolutionary The former considers that the State being dominated by the capitalist is useless as an instrument to abolish capitalism, the latter, that if the citizens of a democracy will simply make adequate use of the political power they have, they can bring about the social millennium through the State The former envisages a dictatorship during the transition period, the latter, a continuous use of democratic methods The former suggests that the State will finally disappear, the latter, that the State will have added functions

### §5 GUILD SOCIALISM

Guild socialism has been popularized as a theory by some English writers, particularly S G Hobson and G D H. Cole It aims at the achievement of socialism with the guild as its foundation The guild is a trade union modified in two ways it will be inclusive of all workers in an industry, including the unskilled workers as well as the clerical, technical, and managerial workers, who are now largely excluded from trade union membership, and it will be organized to control industry, not merely to secure better conditions of work The trade unions are the key to the situation in two respects they will become the guilds of tomorrow, and they are the organizations by means of which the actual transition to socialism is to be accomplished<sup>1</sup>

The guild socialists recognize with other socialists the evils of the present social organization—poverty, inequality and insecurity In particular, they stress two defects, the one political, the other economic From the political point of view, that a Parliament elected from territorial constituencies should exercise a general power of law-making is wrong, no man can represent another, an agriculturist may represent agriculturists, a lawyer, lawyers, and a coalminer, coalminers Functional representation is clearly indicated Further, the State, being but one association among several associations, can exercise power only in a limited field, i.e. the political, it should have no concern with other functions which should be left to other organized, func-

<sup>1</sup> Joad, op cit, p 84

tional bodies From the economic point of view, the most important single defect of the present social organization is the wage system, for, under present conditions, the wage worker in return for his wage surrenders all control over the organization of production and all claim upon the product of his labour. This is clearly inadequate. Economic freedom demands that industry should be administered by all the workers, both manual and intellectual, who carry on the industry.

The structure of the guild socialist society is somewhat as follows (i) There will be a guild for each industry which will be administered by the guild on behalf of society (ii) Consumers' councils will co-operate with the bodies of producers to determine costs and prices (iii) A common Parliament will (according to some authorities) look to the affairs common to all, such as defence and taxation. On this point, however, there is some difference of opinion, some thinkers suggesting a body representing the essential functional associations to regulate such matters (iv) There will be local regional bodies to look after matters of common interest in the locality.

The methods to be used to achieve this society are partly the political method of the collectivist, and partly the economic method of the syndicalist.

Guild socialism as a political theory has this value: it stresses the desirability of producers' participation in the management of the workshop. Its defects are that (i) as a socialistic system, it asks too much of human nature, (ii) the functional representation which the theory stresses is open to the objection that it underestimates the unity of society, territorial representation with all its defects is a rough device for the expression of the common interest, and (iii) it may be unworkable in practice. 'The constitution of the State contemplated, especially in its latest elaboration by Mr Cole, is a complicated nightmare of committees and joint-committees which reminds one of the machinery made by boys out of Meccano' (Hearnshaw).

## §6 AN ESTIMATE OF SOCIALISM ✓ 21

We have described the various schools of socialist thought and are in a position to form an estimate of socialism. Is socialism practicable? Is it desirable? How far is it likely to remove the defects of the existing social organization? It is obviously



difficult to give definite answers to these questions. Socialism is still largely theoretical and the only experiment on which a judgement can be based is not only incomplete, but the available accounts of it vary far too much to be made the basis of correct conclusions

On one thing, there is general agreement · socialism is strong in its critical, if not in its constructive, aspect It points out clearly the evils of an acquisitive, capitalist society its inequality, poverty, and insecurity, the agitation it stirs up reveals maladjustment, and presents a plea for the needy and the weak It emphasizes the economic foundations of the good life . ' that while civilization may be everything above mere subsistence, the base cannot be neglected ' It exposes the fallacies of unbridled individualism, and suggests that social action can very largely overcome the hazards of a competitive society It is a significant challenge to our generation to produce an acceptable alternative, if its thesis is considered erroneous

It is on its constructive side that socialism has had its severest critics (i) It is asked whether socialism is at all practicable as a permanent way of social life It goes contrary to the well established facts of human nature Man puts forth his best effort because he knows that the reward of his effort can, in the main, be enjoyed by himself and his family It is doubtful if he will work for society with the same enthusiasm that he now displays in working for himself (ii) Socialism is another name for slavery As Spencer put it ' Each member of the community as an individual would be a slave of the community as a whole ' If all industry and commerce must be managed from a central authority which has to calculate and regulate everything, it follows that all deviations from the appointed and expected routine on which these calculations are based must be strenuously put down The order of things established by the State must be maintained at all costs, and all opposing individual interests, wishes or aspirations must be remorselessly brushed aside<sup>1</sup> (iii) Socialism must mean the regulation of the laws of supply and demand, a task impossible of fulfilment No central authority can ever regulate production so as to meet the constantly varying demands of every part of a great nation (iv) State management may be less efficient than private management

<sup>1</sup> M'Kechie, *The State and the Individual*, p 192

It is significant that academic economists of the standing of Professor Pigou<sup>1</sup> (not a professed socialist) have refused to accept these rather 'old-fashioned' arguments at their face value. They point out, for instance, that the problem of incentive to work is not so simple as stated above all work is not unpleasant, it is possible by the application of science to reduce the number of unpleasant jobs in society, the latent forces of professional pride, joy in work, and the sport *motif* can be enlisted in the service of society. Again, socialism is not a rigid system it is possible to manage State-owned industries efficiently and maintain the freedom of the individual through the development of new socialistic techniques, as, for instance, their management through public boards or commissions on a semi-public, semi-commercial basis.)

Nevertheless, there is an element of uncertainty and of risk when one leaves well-tried paths of economic and social organization for new ones Pigou himself therefore prefers accepting for the time being the general structure of capitalism and modifying it with a view to reduce economic inequalities and promote social welfare There is considerable truth in a remark of M'Kechie<sup>2</sup> that a true theory of the State must be socialistic and individualistic at once, and it is a false science which finds place for only one of these What we need is capitalism transformed so as to combine safeguards for public interest with scope for private ownership and initiative, public supervision to be proportionate to public interest Economic practice and theory are slowly discovering the outlines of such a system. a central planning machinery with the object of increasing efficiency in production all round, the nationalization of public utilities and their direction for public ends with adaptable commercial business management through public corporations, the encouragement of consumers' and producers' co-operation to eliminate middlemen, the organization of marketing, the avoidance of large fluctuations in the demand for capital goods through the control of the rate of interest and a wise public works policy, the development of the Investment Trust for the rational direction of the flow of investment, the limitation of profits, minimum and maximum wages, the organization of the industrial unit in such a way as to secure efficiency as well as freedom, the collaboration of capital and labour in joint councils and corporations

<sup>1</sup> See his *Capitalism versus Socialism*

<sup>2</sup> *op cit*, p 182

on the model of the corporative State; income and inheritance taxes Details apart, the economic basis of a free society should be a basic equality, the differences to be the outcome of genuine variations and explicable in terms of the common good This will naturally lead to the predominance of the middle class in society, which Aristotle considered the greatest bulwark of stability in the State.—

## §7 FASCISM

The word 'fascism' is derived from Italian *fascio*, = 'a group or cluster', it is used of a cluster of plants or branches which grow stronger by being thus bound together A *fascio* of sticks with an axe in their midst was carried by the Roman lictors before the Roman consuls and represented the authority of the State, it was from the lictors' *fascies* that the present-day Italian fascists derived their emblem

The theory of fascism is primarily an Italian product, evolved to justify the fascist movement<sup>1</sup> The creation of a State of truly sovereign authority which dominates all the forces in the country and which at the same time is in constant contact with the masses, guiding their sentiments, educating them and looking after their interests—this is the central political idea of fascism

In the words of Mussolini, fascism repudiates (i) pacifism, (ii) socialism, (iii) democracy and (iv) individualism

(i) It repudiates pacifism, because that is born of a renunciation of struggle, and is an act of cowardice Perpetual peace is neither possible nor desirable 'War is to man what maternity is to woman'

(ii) It repudiates socialism, because it believes that the institution of private property strengthens family ties and, if properly regulated, is generally in the interests of the community

(iii) It does not believe in democracy The majority, simply because it is a majority, has no power to direct human society, the sum of wills is not the same thing as the general will The majority is not necessarily more reasonable than the minority The democratic notion of the equality of man is wrong Democracy indeed gives power to the masses to decide innumerable

<sup>1</sup> See below ch XXI Mussolini is indeed the most authoritative exponent of the philosophy of fascism The account given in the text is primarily based on his essay, 'The Political and Social Doctrine of Fascism' translated in *The Political Quarterly*, Vol IV, 1933, pp 341 ff

issues, about which they cannot possibly have the knowledge required to exercise a sound judgement, the masses are led by clever, unscrupulous demagogues, who have the gift of the gab. Further, 'popular government does not tend to throw up an aristocracy of intelligence and character

In contrast to democracy fascism believes in the principle that authority is exercised for the sake of the community, but is not derived from the community. The specific sanction of a government is its power, its ultimate sanction, its reasonableness. The fascist would wholeheartedly subscribe to Carlyle's idea

'Find in any country the ablest man that exists there, raise him to the supreme place and loyalty, reverence him, you have a perfect government for that country, no ballot-box, parliamentary eloquence, voting, constitution building or other machinery whatsoever can improve it a whit. It is the perfect State, the ideal country'

(iv) It repudiates individualism. The business of the State is to govern. The conduct of life cannot be left to the individual choice of the people, it must be, instead, determined for them by a power which is above them and comprehends them, viz the State. The State must preside over and direct national activity in every field, and no organization whether political, moral or economic can remain outside it. 'All within the State, none outside the State, none against the State'. The State is totalitarian. Individuals are transitory elements, they are born, grow up, die and are replaced by others, while society must be considered an imperishable organism, which always retains its identity and its patrimony of ideas and sentiments which each generation receives from the past and transmits to the future. As the Charter of Labour in Italy put it 'The Italian nation is an organism having ends, life, and means of action superior to those of the separate individuals or groups of individuals which compose it. It is a moral, political, and economic unity that is integrally realized in the fascist State'. The State may, therefore, in principle

'control every act and every interest of every individual or group, in so far as the good of the nation requires it, and of this the State is itself the sole judge. Except by the permission of the State, there may be neither political parties, trade unions, industrial or commercial associations, except under the regulation of

the State, there may be neither manufacture, business, nor labour ; both work and leisure are within the control of the State , except under the direction of the State, there may be neither publication nor public meeting , education, indeed all the ethical, intellectual, and even religious interests of its members are theoretically within the keeping of the nation and the supervision of the State 'r

By way of criticism, it is sufficient to say that fascism represents in political theory a view diametrically opposite to the one developed in the foregoing pages That view, which may be called liberal, is that the ultimate purpose of man is man himself , the State is a means to the development of individual personality and is not an end in itself Our aim is, according to the liberal view, to enable the individual to think and express what he likes, to plan his way of life in his own way and to grow to his natural height without dictation from outside, provided he does not interfere with the equal freedom of others and does not exploit the weakness of others to his private advantage The liberal view stresses freedom , the fascist view, authority

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## CHAPTER X

# FORMS OF GOVERNMENT

### §1 MONARCHY

The freedom of the individual, which is the central subject of political inquiry, is considerably affected by the form of government under which he lives. A citizen, for instance, is obviously more free under a democracy than under a dictatorship. The forms of government have, therefore, a place in a discussion of political theory. Among these forms, the earliest has been monarchy, i.e. government by one individual not subject to any legal limitations, 'who does everything according to his own will'.<sup>1</sup> A good king, indeed, as James I said,<sup>2</sup> 'will frame all his actions according to the law, yet he is not bound thereto but of his good will and for good example to his subjects'. Hereditary monarchy is the normal type, but elective forms are also known, as in ancient India and Rome and in Poland until recent times. In any case, the essence of monarchy is 'the personification of the majesty and sovereignty of the State in an individual'. This means two things: (i) the personal elevation of the head of the State, as the individual representative and organ of the supreme power, and (ii) the substantial concentration in the monarch of the highest dignity and power of the State.<sup>3</sup>

Two forms of monarchy are usually distinguished, absolute and limited or constitutional. In the former, the monarch is the head of the State both in name and in fact, in the latter only in name. The power of a constitutional monarch is regulated by the constitution. He can promulgate only those laws which are agreed to by the elected Parliament. Similarly, the 'financial arrangements and the granting of taxes are also dependent upon the co-operation and consent of the representative bodies'. In administration, the king is bound to accept the advice of ministers who are chosen from, and are responsible to, the Parliament. Finally, he 'is bound to respect not only the

<sup>1</sup> Aristotle, *Politics*, § 1287a

<sup>2</sup> *The True Law of Free Monarchies*. The word 'monarchy' is from the Greek *monarkhes* (*monos* alone, *arkho* rule)

<sup>3</sup> Bluntschli, *The Theory of the State*, p. 431

letter of the constitution, but also the laws of the State. He can only expect and demand obedience as regulated by the constitution and the laws'.<sup>1</sup> It may, however, be doubted whether such a form of government (e.g. in Britain) is to be counted monarchical at all,<sup>2</sup> it is much the same in principle as a democratic government, because the substance of power is with the people.

### Merits

Monarchy has been defended from time to time on various grounds: the unity and orderliness necessary for every stable political society can best be secured only where supreme authority is vested in a single ruler. The greater the unity within the Government itself, the greater the likelihood of achieving unity among the people.<sup>3</sup> Monarchy helps to harmonize different interests and prevents social strife. Because it best satisfies the criterion of unity, says Rousseau, it is also the most vigorous system.

'The will of the people, the will of the prince, the public force of the State, and the particular force of the Government, all answer to a single motive power, all the springs of the machine are in the same hands, the whole moves towards the same end, there are no conflicting movements to cancel one another, and no kind of constitution can be imagined in which a less amount of effort produces a more considerable amount of action'.<sup>4</sup>

Again, monarchy is a natural institution, obedience to a king being as natural as the obedience of a child to its parents. This was the view of Francis Bacon (1561-1626). Filmer in his *Patriarcha* (1680) suggested that the State is but an extension of the family, the king being the father, the people his children.

Burke supported monarchy for historical and practical reasons: where hereditary kingship has been in existence for a considerable time, it is unwise and unnecessary to abolish it. The democratic element can be grafted on to it, and nothing will be gained by abolishing it.

Monarchy is best adapted to deal with emergencies, thought Bodin (1530-96), for the monarch need not consult others before deciding on the necessary action.

<sup>1</sup> *ibid*, p. 437

<sup>2</sup> See Gilchrist, *Principles of Political Science*, p. 242

<sup>3</sup> St Thomas Aquinas (1227-74) in *The Government of Princes*

<sup>4</sup> *The Social Contract*, p. 62

In certain circumstances, the king may well be the protector of the people at large from the tyranny of the few.

‘A great population [as in Russia before 1917] scattered over a large territory and struggling against the oppression of great magnates, being unable to organize concerted action over so large a space, may collect all its power into the hands of an individual, and arm him with a sort of iron mace strong enough to crush any or all of the enemies of the people’<sup>1</sup>

In Germany in the Middle Ages, the Crown ‘became what it has been wherever an aristocracy presses upon both [Crown and people], the ally of the people’<sup>2</sup>

And, finally, it provides the most satisfactory government for those who cannot govern themselves, who ‘have not yet developed a high political consciousness and who therefore lack the capacity themselves for participating actively in the management of public affairs. Perhaps no better form could be devised for disciplining uncivilized peoples, leading them out of barbarism and inculcating in them habits of obedience’<sup>3</sup>

### Defects

These arguments assume not only that the monarch is able and hard-working, but also that he deliberately rules for the good of his people. The defects of monarchy primarily arise from the fact that this assumption may not always be justified. Ability, industry and good intentions are not hereditary, and ‘history indicates that for a Louis XIV a country has to pay the price of a Louis XV and Louis XVI’ In the hands of a bad ruler, despotism is the worst form of government, because unified power is for evil, as well as for good, mightier than dispersed power. Further, while the wise and strong king will realize that it is in his interest to keep his people strong and prosperous—for their power, ‘being his own, might make him formidable to his neighbours’<sup>4</sup>—the unwise and weak one may be tempted, in order to maintain his position, to ‘keep them weak, so that they may be unable to resist him

It is not right, however, for us to judge any form of government by a degraded specimen. The truth is that the utility

<sup>1</sup> Seeley, *Introduction to Political Science*, p. 171

<sup>2</sup> Bryce, *The Holy Roman Empire*, p. 132.

<sup>3</sup> Garner, *Introduction to Political Science*, p. 207

<sup>4</sup> Rousseau, *op cit*, pp. 62-3



of particular forms of government is, as Aristotle long ago saw, relative to circumstances Where one individual is clearly superior to the rest of the community in ability and character, as Aristotle said, or where the people are divided among themselves and are unable to govern themselves, monarchy is indicated It has, besides, the great advantage, in Bagehot's phrase, of being an intelligible government

'The mass of mankind understand it, and they hardly understand any other The nature of a constitution, the action of an assembly, the play of parties, the unseen formation of a guiding opinion are complex facts, difficult to know and easy to mistake But the action of a single will, the fiat of a single mind, are easy ideas anybody can make them out and no one can ever forget them Royalty is a government in which the attention of the nation is concentrated on one person doing interesting actions A republic is a government in which that attention is divided between many, who are all doing uninteresting actions. Accordingly, so long as the human heart is strong and the human reason weak, royalty will be strong because it appeals to diffused feeling, and republics weak because they appeal to the understanding'<sup>1</sup>

## §2 ARISTOCRACY

Aristocracy is literally 'government by the best citizens'<sup>2</sup> A State governed by the best men, upon the most virtuous principles, has alone a right to be called an aristocracy,<sup>3</sup> its principle, therefore, is virtue the moral and intellectual superiority of the ruling class 'It loses all real vitality', says Bluntschli,<sup>4</sup> 'when the ruling class degenerates from the qualities which raised it to power, when its character decays, and it becomes weak and vain It perishes equally, even though its great qualities remain, when the subject classes attain to equal distinction' The distinction of quality, which ought to characterize an aristocracy, may be expressed through birth (aristocracy of family), culture and education (aristocracy of priests or of scholars), age (aristocracy of elders), military distinction (aristocracy of knights), or property (aristocracy of landowners)<sup>5</sup> The two most successful aristocracies of history are those of Rome during the period from

<sup>1</sup> W Bagehot, *The English Constitution*, pp 33-9

<sup>2</sup> Greek, *aristokratia* (*aristos* best + *kratia* rule)

<sup>3</sup> Aristotle, *op cit*, §§ 1293b and 1294a

<sup>4</sup> *op cit*, pp 451-2

<sup>5</sup> *ibid.*

the fourth to the second centuries B.C., and of Britain in the eighteenth century

In theory, there is much to be said in favour of an aristocratic government. It stresses quality, as against quantity. It gives the community a ruling class, who inherit and bequeath to their posterity high traditions of public service, and who can be trusted to administer public affairs with a complete personal integrity and honour, because they possess a great position independent of politics. It seems to be a natural institution. Even Rousseau thought<sup>1</sup> that 'it is the best and most natural arrangement that the wisest should govern the many, *when it is assured that they will govern for its profit, and not for their own*' 'It is the everlasting privilege of the foolish', said Carlyle, 'to be governed by the wise'. In a famous passage, he tells us<sup>2</sup>

'Surely, of all "rights of man", this right of the ignorant man to be guided by the wiser, to be, gently or forcibly, held in the true course by him, is the indisputablest. Nature herself ordains it from the first, society struggles towards perfection by enforcing and accomplishing it more and more. In Rome and Athens, as elsewhere, if we look practically, we shall find that it was not by loud voting and debating of many, but by wise insight and ordering of a few that the work was done. So is it ever, so will it ever be.'

Besides, aristocracies are conservative, and an element of conservatism is necessary for the health of the body politic. They avoid rash political experiments, they advance by cautious and measured steps. As Montesquieu noted, they have the great virtue of moderation. This moderation is dictated by the need for their security, they have always to remember that the subject masses are superior in number and physical force, and, therefore, an immoderate use of their power may lead to resistance. Above all, aristocracies are conducive to progress. History is a sound aristocrat. The progress of mankind has hitherto been effected, said Maine, 'by the rise and fall of aristocracies, by the formation of one aristocracy within another, or by the succession of one aristocracy to another'<sup>3</sup>

If every aristocracy answered to its ideal description, it would be the best form of government. But historical reality has

<sup>1</sup> op. cit., bk. III, ch. V, italics ours

<sup>2</sup> *Chartism* (1839)

<sup>3</sup> *Popular Government*, p. 42

little in common with the ideal of political philosophers. It is the tragedy of all aristocracies, says a competent authority,<sup>1</sup> that they have degenerated so quickly into oligarchies; the attempt to arrest the development of the constitution at the aristocratic stage, and to devise safeguards against its degenerating into an oligarchy, has never succeeded. Aristocracies tend to become constantly smaller and more exclusive.

'The famous aristocracy of Venice is perhaps the best example of this. The almost unrestrained powers, which in the seventh century had been vested in the Doge, were in 1172 limited by the institution of the Great Council, a body of 480 citizens. These, although originally elective, rapidly become a hereditary aristocracy. And out of this there developed a smaller executive council, the *pregadi* or Senate, and of this six were chosen as direct advisers of the Doge. But in the fourteenth century, owing to the attempts of the people to regain control over the government, the aristocracy sacrificed their own power to the famous institution, the Council of Ten, a body whose criminal jurisdiction was so complete that the real government of the State fell into its hands.'<sup>2</sup>

From exclusiveness to arrogance and pride is an easy step, the ruling aristocrats 'have often displayed towards the lower classes a harshness and cruelty which have been the more intolerable because accompanied by contempt'. Witness the treatment of the Helots by the Spartans, and the oppression of plebeian debtors by the Roman patricians.

A second great defect of aristocracy, says Bluntschli,<sup>3</sup> is its excessive rigidity. Society is hardly static. It is the mark of a good Government to adapt itself to changing social and economic conditions. But aristocracies, in the attempt to preserve their power, are unwilling to adapt themselves. Thus the decline of the feudal aristocracy of Europe in the Middle Ages and of the Whig aristocracy of Britain in the eighteenth century has been attributed partly to their inability to adjust themselves to the social and economic changes introduced by the maritime discoveries and the Industrial Revolution respectively.

These defects have in modern times, generally, led to the discrediting of aristocracy, though critics of democracy and particularly the fascists are inclined to sing its praises. The modern

<sup>1</sup> E. F. Bowman, *An Introduction to Political Science*, p. 75

<sup>2</sup> *ibid*, p. 76

<sup>3</sup> *op cit*, p. 454

view is that aristocracy has a great value as an element in a State rather than as a form of government every society, whatever its form of government, should arrange its social and political institutions in such a way that the opinions of the best citizens will shape the decisions arrived at by the Government

### §3 DEMOCRACY

Democracy may be described as a system of government under which the people exercise the governing power either directly or through representatives periodically elected by themselves. This means that a State may, in political science, be termed a democracy if it provides institutions for the expression and, in the last analysis, the supremacy of the popular will on basic questions of social direction and policy. Other factors, such as economic equality, fraternal feeling and the small size of the State, are desirable and make for its successful working, the optimum of democracy, political liberty is the indispensable minimum.

The content of political liberty has differed in different countries at different times, but its essence is the right of every man bound by the decisions of a Government to contribute (whatever is in him to contribute) to the making and remaking of those decisions. Its institutional expressions (in modern *representative* democracies) are the equal rights of all normal adults to vote and to stand as candidates for election, periodical elections, equal eligibility for executive and judicial office (provided the essential qualifications for the performance of these duties are satisfied), and freedom of speech, publication, and association. These rights provide the opportunities for political participation, i.e. for choosing rulers and deciding the general lines of their policy, they enable those who are so minded to devote themselves to political problems as much as they please. The social environment, economic resources, and natural endowments decide the extent to which these legal rights are effectively used, but even to those who are the least politically minded, opportunity is provided by these rights to pass judgement freely and frequently on the work of the political engineers whose decisions affect their lives. There is political equality at a minimum level.

Among the political rights outlined above, stress must be laid on the rights of speech, publication and association. These rights are integral to democracy because they make possible free

discussion and the *continuous* participation of the people in the Government, not only at the time of the general elections. Free discussion is necessary because democracy is based on a belief in the value of individual personality. This implies the obligation to respect the other man, to listen to his arguments and to take into account his point of view. Its classical expression is to be found in the saying attributed to Helvetius. 'I detest your opinions, but I will contend to the death for your right to utter them.' The process of law-making should therefore allow full scope for the consideration of different and opposing viewpoints. Those who are adversely affected by a law must feel that their case has been properly heard.

Free discussion, free association and periodical elections ensure another essential of democracy, which it is important to note, especially in contrast to modern dictatorship, viz the possibility of an alternative Government. Where power is conferred permanently, or where, on account of an atmosphere of fear and coercion, people do not feel free to discuss, vote and displace the existing Government if they want to do so, democracy cannot be said to exist, even though the other political rights enumerated continue to be enjoyed by the people.

### *Conditions of success*

The opportunity for political participation, political equality and the possibility of an alternative Government—these make a State democratic in form. In order, however, that democracy may work successfully, certain additional conditions are necessary. Foremost among these is the widespread habit of tolerance and compromise among the members of a community, a sense of 'give and take'. This is necessary because democracy involves the conception of majority rule, and the acquiescence of the minority in the decision of the majority. If either presses its demands at the expense of the other, democracy becomes difficult to work. Such a temper can exist in a society only if there is a general agreement on fundamentals among the members thereof, it is difficult to secure if there are deep cleavages concerning their fundamental institutions. It is difficult, for instance, to secure compromise where a strong minority believes passionately that private property is theft, whereas the majority believes in its sanctity. That is why political theory has agreed

with Mill that it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities. The sense of belonging together creates a readiness on the part of the members of a State to subordinate their differences to the common good.

There must, secondly, be the provision of adequate opportunities for the individual to develop his personality: access to knowledge, through a system of State-aided free education, security against unemployment, a minimum wage (which should include provision against sickness and for old age), coupled with fair conditions of work, leisure, and some voice in determining the conditions of work to guard against economic slavery. This implies that vast disparities in the distribution of national wealth should be progressively reduced. The connexion between such a postulate and effective democracy is clear: men languishing in want and living under insecure and deleterious conditions of work can hardly be blamed for not taking that intelligent part in the Government which democracy demands. Great accumulations of wealth also lead to an undue influence of money-power in politics, with all its attendant evils.

Democracy demands from the common man a certain level of ability and character: rational conduct and active participation in the Government, the intelligent understanding of public affairs, independent judgement, tolerance and unselfish devotion to public interest. It is the excellence of individual character that has made Switzerland the envy and pattern of modern democracies.

'Survey the countries of the world,' writes Dubs, 'you may find elsewhere greater political achievements, but assuredly in no country will you meet so many good citizens of independent opinions and sound practical judgement, nowhere so great a number of public men who succeed in fulfilling their functions in minor spheres with dignity and skill, nowhere so large a proportion of persons who, outside their daily round, interest themselves so keenly in the welfare and in the difficulties of their fellow citizens.'

To equip the citizen for the performance of his civic duties, education 'in the spirit of the constitution' is necessary. Free and compulsory education is not sufficient, it must also be suited to the requirements of democracy. It must help to produce thinking human beings, men and women, who will take an

intelligent interest in public affairs, and will be critical of the Government, who will be tolerant of views different from their own, and who will not pervert public power to private interest. If, instead, the educational system produces fear, an uncritical herd instinct, selfishness and indifference to common affairs, the Government will sooner or later be turned into a dictatorship, open or veiled.

And, finally, democracy requires proper organization and leadership. Organization is supplied by parties, which, in spite of their admitted defects,<sup>1</sup> are essential to the successful working of representative government.

The difficulty and the importance of leadership in democracy arises from two facts.

(1) In the complex society of modern days, on most of the questions which matter in government, a general will—in the sense of a clearly desired end related to the means by which this end may be realized—simply does not exist.

(2) For most people, government is only a part and, with many, the least important part, of the business of life. Earning a living, family and social calls and amusements occupy a good part of their time and attention.

To rouse such men and women to a sense of their common interest and their public duty, to think out what are, in a given period, the best interests of the community and the means to achieve them, to present them in a simple, intelligible and interesting form to the common man and get his general (and continuing) consent to them and to reshape them in the light of altered circumstances are the functions of leaders in a democracy. To perform them successfully certain qualities are demanded: a will directed to a high purpose clearly visualized and courageously pursued, the instinct of gauging clearly the needs of the people and the initiative to formulate means of realizing them, the ability to present issues clearly to the people and to arrive at a fair judgement of the content of public opinion at a given time, self-reliance, honesty and a sense of responsibility. To the extent that leaders display these qualities, do they contribute to the success of democracy.

<sup>1</sup> See below, ch XXVII, §6

*Defects*

The history of democracies shows that these conditions are rarely fulfilled. In practice democracy is the rule of ignorance. It pays attention to quantity, not to quality, votes are counted, not weighed. A large number of citizens still regard government as something quite apart from the main business of life, in which they have no vital concern, they work and play, practise the professions and the arts; plough, sow, harvest, and sell, and forget that they are the governors. There is a real danger in democracy that the citizens may not be sufficiently educated to appreciate the meaning of the issues which come before them at elections. They may be misled by class passions or by demagogues. Sir Henry Maine went so far as to say that democracy can never represent the rule of the many because, as a rule, the people merely accept the opinions of their leaders.

Further, it may be argued, modern democracy is capitalistic, i.e. the political State represents nothing but the rule of a propertied oligarchy—an opinion held particularly by socialists. The principle and the practice of representation are also faulty. No man, says Cole, can represent another, at best one can represent only a function.<sup>1</sup> As it is, a representative knows enough of everything to do everything badly, and enough of nothing to do anything well. Even granting that territorial representation is free from defects of principle, in practice it rarely achieves the purposes of representation. True representation is secured only if Parliament represents every element and every interest in the nation in proportion to its relation to the whole. But Parliament is rarely 'a mirror of the nation'. Moreover, democracy in practice is too slow in arriving at a decision as it has to consult a number of interests, as Baldwin said, it is always two years behind dictatorship.

There are some who question a fundamental principle of democracy, viz. majority rule. Thus, according to Burke, decision by a majority is not a law of nature. The smaller number may be the stronger force and may have all the reason against the mere impetuous appetite of the majority. There is as little of utility or policy as there is of right in the maxim that the will of a mere majority should be law. The fascists similarly condemn the principle except, they say, among a body of

<sup>1</sup> See above, p. 128



specially competent judges, the majority has no greater likelihood of having reason on its side than the minority has

Above all, democracy is a difficult form of government, for the assumptions on which it rests are difficult of fulfilment. It assumes civic capacity on the part of the citizens. This capacity, according to Bryce, involves three qualities. *intelligence*, *self-control* and *conscience*. The citizen must be able to understand the interests of the community, to subordinate his own will to the general will and must feel his responsibility to the community and be prepared to serve it by voting and by choosing the best men. Bryce, in a classic analysis, points out that in practice these assumptions have not adequately been fulfilled. Instead, *indolence* makes itself felt in the neglect to vote, the neglect to stand as a candidate for election, and the neglect to study and reflect on public questions, *private self-interest* reveals itself in the buying of votes, in class legislation and in other forms of corruption, *party spirit* kills independent judgement.

### *Merits*

Democracy, with all its defects, implies a recognition of the duties of government and the rights of the people. It postulates a measure of personal freedom and equal consideration for all classes. As John Stuart Mill said, it is superior to other forms of government because the rights and interests of every person are secure from being disregarded only when the person interested is himself able and habitually disposed to 'stand up' for them, and the general prosperity attains a greater height and is more widely diffused in proportion to the amount and variety of the personal energies enlisted in promoting it. The participation in governmental affairs lifts the individual above the narrow circle of his egoism and broadens his interests. It makes him interested in his country and gives him a sense of responsibility.

According to MacIver,<sup>1</sup> in democracy the Government is less dependent on the psychology of power than in other forms of government. Always those who wield power are tempted to extol it, but the more so if that power is unchecked and irresponsible. Democracy makes authority a trust; the common interest, the common welfare, becomes the sole justification of government.

<sup>1</sup> *The Modern State*, p. 229

It is the importance which a democratic system attaches to human personality that makes it valuable. The democratic method is to reach decisions by discussion, argument and persuasion. Democracy does not believe in suppression of thought.

And, finally, the standard by which one can measure the merit of a form of government, says Bryce, is the adequacy with which it performs the chief functions of government: the protection from internal and external enemies, the securing of justice, the efficient administration of common affairs. History shows that these functions have been carried out as well by democracies as by any other form of government. If democracy has failed to subdue the clash of capital and labour, to establish peace between nations, and to abolish corruption, it is because no form of government can be expected to accomplish a revolution in human nature. No realistic thinker regards democracy as the ideal form of government, it is at best the least objectionable form of government that is practicable. 'Things may be bad today, but they were worse yesterday. As Cavour said, however faulty a legislative chamber may be, an ante-chamber is worse. However grave the indictment that may be brought against democracy, its friends can answer, "What better alternative do you offer?"'

The truth seems to be that democracy contains within it the seeds of dissolution and decay, as well as of life and progress. It may conceivably lead to the despotism of a collective mediocrity, the negation of freedom, the free play of self-interest, and the deterioration of individual and national character. But under favourable conditions it encourages the intelligence, self-reliance, initiative and social sense of free men by placing the ultimate responsibility for government on the citizens themselves, it makes authority a trust, and ensures equal consideration for all. Its success depends on the spiritual effort the people put forth and the readjustment of democratic institutions in accordance with changing conditions.

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## CHAPTER XI

# INTERNATIONAL RELATIONS

### §1 NATIONALISM MERITS AND DEFECTS

We have earlier referred to the fact that the freedom of the individual is considerably affected not only by the form of government but also by the relations of his State with other States, and, therefore, these inter-State relations are of great importance to political theory. To this subject we must now turn.

Modern States are sovereign States. They are, therefore, independent in relation to other States. They do not brook interference from other peoples. Further, they are in general organized upon a national basis and unified by national sentiment. Two things, as Renan insisted,<sup>1</sup> go to make up this sentiment.

'One of these lies in the past, the other in the present. The one is the possession in common of a rich heritage of memories; and the other is actual agreement, the desire to live together, and the will to continue to make the most of the joint inheritance.

To share the glories of the past, and a common will in the present, to have done great deeds together, and to desire to do more—these are the essential conditions of a people's being'.

Modern nationalism is a powerful sentiment, whether it is good or bad depends upon how we are able to organize and use it for constructive ends. That it has considerable merits is now generally recognized. First, it rescues the world, as Burgess recognized,<sup>2</sup> from the monotony of the universal empire. This is an indispensable condition of political progress. 'We advance politically, as well as individually, by contact, competition and antagonism. The universal empire suppresses all this in its universal reign of peace, which means, in the long run, stagnation and despotism.' Just as the destruction of individuality may destroy genius, so the attempt to make all groups of men exactly alike in their customs or creeds may destroy some special character of endurance or wit, which may be developed even in a small nation. 'There is some special quality in every group'.

<sup>1</sup> 'What is a Nation?' in *Modern Political Doctrines*, ed. by A. Zimmern, pp. 202-3.

<sup>2</sup> J. W. Burgess, *Political Science and Constitutional Law*, Vol. I, pp. 38-9.

says Burns,<sup>1</sup> 'which it would be well for the sake of the whole of humanity to preserve But this can only be preserved if the group has an opportunity for characteristic development of its own laws and institutions.' Nationalism is but a recognition of the principle that States should vary in their methods of law and government, reflecting in their variety the distinctions of human groups. Not only does each nation gain in its individuality, but humanity as a whole thereby adds to its cultural wealth 'For the human race is not at its best when every man or every group is a copy of every other Civilization progresses by differentiation as well as by assimilation of interests and character'

Secondly, States that are unified by national sentiment are always more stable and their laws are always better obeyed than States that are only held together by subjection to a common authority. Moreover, it is only in national States that the institutions of self-government can ever work properly, because it is only in these States that the people can sympathize with one another sufficiently to be willing to submit to the decisions of a majority. In the words of Burgess<sup>2</sup> 'The national State solves the problem of the relation of sovereignty to liberty; so that while it is the most powerful political organization that the world has ever produced, it is still the freest.'

But the great defect of nationalism is that it contains within it the possible source of its own destruction, and, unless carefully guarded against exaggeration, will of itself lead to a disturbance of the equilibrium upon which the diversity of our civilization depends<sup>3</sup> 'Within the latter half of the nineteenth century, nationalism has been thus exaggerated; going beyond a healthy desire to express the true native characteristics of a people, it has come, in some quarters, to mean the decrying, as barbarous or decadent, of everything originating outside of the national boundary' It becomes exclusive This exclusiveness leads to two evil consequences of the first magnitude

(i) *Economic* It makes the optimum utilization of the world's economic resources impossible. Ever since the Industrial Revolution, the world has economically been more and more unified Distance has been reduced The countries of the world have become more than ever interdependent in respect of

<sup>1</sup> C D Burns, *Political Ideals*, p 179

<sup>2</sup> *op cit*, pp 38-9

<sup>3</sup> P S Reinsch, *World Politics*, pp 3-7

capital, raw materials, skilled labour and markets. Interdependence is a reality, but, with its trade restrictions and tariffs, its customs and its quotas, the nation-State sets up barriers between itself and its neighbours and thereby prevents the free flow of trade; the result is an imperfect utilization of the world's economic resources. As Joad puts it<sup>1</sup> effectively

'On the one side—the side of technology, economics and common sense—is a manifest drive to unity, and on the other—the side of politics, pugnacity and reaction—are the nation-States that impede and obstruct it. on the one hand the revolution in living caused by the changes in our environment, on the other, the obsolete divisions of mankind which the State exists to perpetuate. on the one hand, the gradual shrinking in the size of the world, on the other, the nation-States whom the shrinking has squeezed so closely together that, unless they can be superseded before it is too late, they will grind one another to pieces'

(ii) *Political Nationalism* has been throughout the modern era the most fruitful cause of wars, divided nations striving for unity, subject nations fighting for freedom, triumphant nations aspiring after domination. It has fostered national arrogance; each nation looks upon itself as the bearer of the only true civilization. It has 'almost obliterated the sense that civilization is a collective achievement and a common responsibility'. It becomes aggressive and regardless of the rights of other nations, and thus a menace to the peace of the world.

## §2 COLLECTIVE SECURITY

The only remedy is, in Laski's pregnant phrase, to equate nationalism with 'right'. Nations must agree to the principle that in matters which touch more than one nation, they will be bound by the decision arrived at by a common international body, in which all nations are in some way represented. Such matters are territorial boundaries, international migration, armaments, tariffs, privileges of national minorities, international communications, foreign capital. Briefly, the external sovereignty claimed by nation-States must be restricted in these matters. There must be the rule of law between nations as there is the rule of law between individuals within each State.

<sup>1</sup> In his Foreword to Duncan and Elizabeth Wilson's *Federation and World Order*, p. xii

The implications of the rule of law between nations are far-reaching, and can be fully grasped only by contrast with the conception which now rules, viz the rule of might. Under the present system, or lack of system, when a nation's interests are supposed to conflict with those of another, the nation concerned resorts to war to secure her interests. This necessarily involves the idea of national security, i.e. States which are judges in their own disputes can use war as an instrument of national policy and must try individually or through alliances to be stronger than every other State or group of States. But the experience of the Great War of 1914-18 and of the present war (1939- ) has been slowly teaching mankind the painful lesson that a system of national security is really impossible for all at the same time, or even for a few for all time. This indeed is inherent in the logic of facts: *every* State or group of States cannot be stronger than *every* other State or group. Might cannot be the basis of right.

What then is the alternative? The answer is the rule of law and collective security. This means three things:

(i) States must agree to the principle that, in matters which affect other States besides their own, they will accept the rule of conduct laid down by a common international authority as binding on themselves.

(ii) They must agree to renounce the right to settle disputes by making war.

(iii) They must 'bind themselves to regard any act of war by any State in breach of this primary obligation as an act of war against themselves and to come to the assistance of the victim of the aggression'.<sup>1</sup>

If every State realizes the truth of these three principles and acts up to them, collective security is assured: the knowledge that an act of war against one is an act of war against all is sufficient inhibition to any possible aggression in violation of international law. There will be the rule of law, not of might; there will be collective security, which will include national security.

### §3 ATTEMPTS AT INTERNATIONAL ORGANIZATION

There are two ways of establishing the rule of law and collective security: the voluntary acceptance of the principle symbolized in a league of sovereign nations and the establishment of

<sup>1</sup> *The Political Quarterly*, Vol. VII, 1936, p. 334

a super-State The League of Nations (1919) is an illustration of the first, Stuet's proposal for a federation of democracies<sup>1</sup> gives us some idea of the second

The idea of establishing some inter-State organization for the prevention of wars can be traced at least as early as the fourteenth century<sup>2</sup> In his work, *The Recovery of the Holy Land* (circa 1305), Pierre Dubois suggested international arbitration and the establishment of an international Judiciary The letters of Erasmus (1466-1536) mention some schemes for establishing a League of Peace In the seventeenth century, Grotius (*The Law of War and Peace*, 1625) and his school formulated some principles which should govern the relations of States towards one another, without, however, suggesting any organization to enforce them The French writer Abbé de St Pierre in the eighteenth century proposed<sup>3</sup> a federation of nineteen States for the maintenance of peace Kant, the German philosopher, in his work *On Perpetual Peace* (1795), suggested that something in the nature of a federation between nations for the sole purpose of doing away with war was the only rightful condition of things reconcilable with individual freedom

The tendency to joint action, as distinguished from theoretical schemes, is noticeable in the Holy Alliance (September 1815) and the Hague Conferences (1899 and 1907)

The Holy Alliance was formed between Russia, Prussia and Austria The signatories declared their

'fixed resolution both in the administration of their respective States, and in their political relations with every other Government, to take for their sole guide the precepts of that Holy Religion, namely, the precepts of justice, Christian charity and peace, which, far from being applicable only to private concerns, must have an immediate influence on the councils of princes and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections They mutually promise to remain united by the bonds of a true and indissoluble fraternity, and, considering each other as fellow countrymen, they will on all occasions and in all places, lend each other aid and assistance, and, regarding themselves towards their subjects and armies as fathers of families, they will

<sup>1</sup> See below, §6

<sup>2</sup> Burns, op cit, pp 305-16, gives a convenient summary of ideas and schemes of international organization prior to 1914

<sup>3</sup> In his work *Projet de traité pour rendre la paix perpétuelle entre les souverains chrétiens* (1713-17)



lead them in the same spirit of fraternity with which they are animated, to protect religion, peace and justice.'

Many rulers of Europe, out of deference to the Tsar of Russia, signed the treaty and were duly admitted to the Holy Alliance. The vagueness of its terms and the failure of its signatories to do it more than lip service led to its failure.

The Concert of Europe was a quadruple alliance between Russia, Austria, Prussia and Britain (formed after the close of the Napoleonic wars) by which the participants pledged themselves to maintain the exclusion of the house of Bonaparte from France, and further agreed to meet together at agreed periods to discuss their common interests and matters affecting the peace and security of Europe. The concert was not able to achieve much because, in the words of Fisher, 'the union of the powers was more apparent than real'; differences in points of view began to develop, and by 1822 it became ineffective.

The Hague Conferences were summoned to meet (at the Hague) in 1899 and 1907 on the initiative of the Tsar of Russia to promote peace and disarmament. At the first conference twenty-six States were represented, and at the second forty-four. The mutual suspicion of Germany, Russia and Britain led to the failure of these conferences, but they resulted in 'the ultimate establishment of an international tribunal at the Hague which contributed to the settlement of many international disputes by arbitration, and led the way to the greater efforts towards international organization made at the end of the Great War'.

#### §4 THE LEAGUE OF NATIONS

These early attempts at international organization were half-hearted and inadequate. Besides, there was no permanent organization of a political character to bring the nations together to enable them to understand one another's point of view, settle disputes and avert war. The League of Nations was established in 1919 to remove these defects, promote international co-operation and achieve international peace and security.

The essential conceptions underlying the League of Nations Covenant are six —

(i) It is necessary to remove the causes of war. Members recognize that this demands the reduction of national armaments

to the lowest point consistent with national safety, and the enforcement by common action of international obligations. They also undertake to respect and to preserve, as against external aggression, the territorial integrity and political independence of members of the League. Treaties between States are also to be registered with the Secretariat of the League, to be published by it as soon as possible, for secret treaties have often encouraged wars.<sup>1</sup>

(ii) If a dispute arises between nations, steps must be taken to prevent it from leading to war. Any threat of war is declared a common concern of the League, members agree that any dispute likely to lead to rupture should be submitted to arbitration, judicial settlement, or to inquiry by the League Council and they agree never to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. They also agree that they will not go to war against any State which complies with the award, decision, or the recommendations of the report.<sup>2</sup>

(iii) If, in disregard of the obligations accepted, a member resorts to war, steps must be taken to help those member-States who stand by their promises. Members therefore agree to subject the covenant-breaking State to

‘the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the preventing of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and nationals of any other State, whether a member of the League or not.’ The League Council, it is also agreed, shall ‘recommend to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to protect the Covenants of the League’.<sup>3</sup>

(iv) The organization of peace is as essential as the prevention of war. Members agree accordingly to secure and maintain fair and humane conditions of labour, to entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest, and to make provision to secure and maintain freedom of communications and of transit and

<sup>1</sup> Articles 8, 10 and 18 of the Covenant

<sup>2</sup> Articles 11-15

<sup>3</sup> Article 16

equitable treatment for the commerce of all members of the League <sup>1</sup>

(v) The well-being and development of the people of the colonies and territories lost by the Central Powers (in the War of 1914-18) form a sacred trust of civilization. Therefore, members agree that the tutelage of such peoples should be entrusted to advanced nations who will exercise such tutelage as mandatories on behalf of the League <sup>2</sup>

(vi) Permanent institutions must be created to carry out the objects of the League. Provision is therefore made to organize an Assembly, a Council, a Secretariat, and a Court of International Justice <sup>3</sup>

All the members of the League are represented on a footing of complete equality in the Assembly, where they have only one vote and not more than three delegates each. The Assembly is authorized to deal with any matter within the sphere of action of the League or affecting the peace of the world.

The Council was originally to be composed of nine members: five Great Powers as permanent members and four non-permanent States elected by the Assembly. Later the permanent members were reduced to four, and the non-permanent members increased to nine. The idea of this distinction between permanent and non-permanent seats is that 'the great Powers, having world-wide interests and heavy political and other responsibilities must have permanent seats on the Council', while for other Powers the principle of representation by a few countries, elected from time to time by the Assembly, can be accepted without injustice. The Council meets more frequently than the Assembly. More than the Assembly, it is in practice responsible for carrying on the work of the League. It appoints and controls various committees, appoints the Secretary-General with the permission of a majority of the Assembly, prepares the agenda for the Assembly and generally is authorized, like the Assembly, 'to deal with any matter within the sphere of action of the League or affecting the peace of the world'.

The Secretariat, the permanent organization of the League, is appointed by the Secretary-General with the consent of the Council. It 'stands in roughly the same relation towards the Council and the Assembly as ministerial departments stand to-

<sup>1</sup> Article 23

<sup>2</sup> Article 22

<sup>3</sup> Articles 2-7

wards their national Governments It collects material before the actual proceedings, and afterwards carries out the decisions taken At the same time, it provides the necessary continuity between one meeting of the Council or Assembly and the next' The expenses are met out of contributions made by members of the League

The permanent Court of International Justice, which was set up in 1920-2, and sits at the Hague, has eleven judges and four deputy judges elected for nine years by the Assembly and the Council It settles such disputes between States as are referred to it and are capable of judicial settlement and gives opinions on matters referred to it by the Council or the Assembly

There is also an auxiliary to the League, viz the International Labour Office, which tries to secure and maintain fair and humane conditions of labour for men, women and children

#### §5 RECORD OF THE LEAGUE

It is now a definitely established fact that, while the League appreciably succeeded in minor spheres of activity, it clearly failed to achieve its primary purpose of maintaining international peace and security

That the League had a measure of success in minor spheres deserves to be better known, as such knowledge will prevent the wholesale condemnation of it implied in current descriptions of it as the 'Geneva Council of Fools' and the 'League of Notions' Thus (1) it has helped to settle some inter-State disputes 'when both parties to a dispute were genuinely attached to peace'. Examples of such settlement are the frontier dispute between Turkey and Iraq (1924-6) and the dispute between Colombia and Peru regarding the Leticia Trapezium (1931-5)<sup>1</sup> In the former, the issue was whether the province of Mosul should belong to Turkey or Iraq A Commission of Inquiry went into the matter and recommended that the territory in dispute should be joined to Iraq Its findings were duly ratified by the League Council In the latter, Colombia and Peru both claimed possession of the territory called the Leticia Trapezium which had in 1928 been ceded by Peru to Colombia Peru later regretted the cession and in 1932 invaded Leticia The issue

<sup>1</sup> For details of these disputes, refer to *The Aims, Methods and Activity of the League of Nations*, 1935

was settled by the League in favour of Colombia. (ii) It has helped, through the Mandate system, to improve the standard of colonial administration. (iii) It has focused attention on the necessity for the fair treatment of minorities, though it has not always succeeded in compelling fair treatment. (iv) It administered two territories, viz the Saar and the City of Danzig, with some success. (v) The Permanent Court of International Justice has delivered over sixty judgements and opinions. Its reputation for impartiality is so great that more than once 'a dispute which has arisen between a powerful State and one far less powerful has been settled in the latter's favour; whereupon the powerful State has invariably yielded with a good grace'. (vi) Through the International Labour Office, attempts have been made to improve the conditions of labour. (vii) It has achieved marked success in its efforts at international financial settlement as in its reconstruction scheme in Austria (1921-2). (viii) Through its technical and social organizations, it has helped to promote international co-operation in economic and social matters. Thus as a result of conferences held in 1921 and 1923 on Communications and Transport, an agreement was arrived at, and ratified by thirty-four States, that all goods transported by rail or inland waterway, whatever their country of origin or destination, should, subject to agreed restrictions, enjoy complete freedom of transit under absolutely equal conditions. The Health Organization set up by the League has helped to co-ordinate the efforts of various European Governments to combat the typhus, cholera and smallpox epidemics, and to conduct research work on the prevention of such diseases as malaria and tuberculosis. Through the League Committee on Intellectual Co-operation, attempts have been made to assist States in the improvement of their educational service, to promote the disinterested discussion of intellectual subjects and spread the ideals of peace. The prevention of forced labour from developing into virtual slavery and of traffic in women and children, the promotion of child welfare and the supervision of the drug traffic—these are the other aspects of social work which have engaged the attention of the League.

But, as we have stated earlier, the League has failed to settle disputes between powerful States. Thus in 1931-3 it was unable to settle the Sino-Japanese dispute. In 1931 Japanese troops

invaded Manchuria, China appealed to the League, the League appointed a Commission of Inquiry and on its recommendations drew up a report (1933) The Japanese Government did not accept the League proposals, but continued to fight, and later withdrew from the League Similarly in 1934-6, the League's advice was not heeded by Italy Italy invaded Abyssinia in disregard of her international obligations, the League offered a solution which was rejected by Italy Then, for the first time in history, about fifty States joined, though without success, to apply the 'sanctions' laid down in article 16 of the League Covenant, against Italy, by imposing an embargo on imports to their countries from Italy, and on the export of arms, etc to Italy. Italy conquered Abyssinia and left the League The failure to settle these disputes apart, the general weakness of the League is obvious in its inability to bring about disarmament, the continuance of secret treaties, the disregard of the League in important international agreements like the 'Munich Pact' (1938) and, above all, in the recurrence and continuance of a second disastrous world war within twenty-five years

How can we explain this failure? What are the defects of the League? Some are clear enough the League was not comprehensive enough, as the United States of America remained outside it, and later, Japan, Germany and Italy left it, it was tied to a vindictive treaty, the Treaty of Versailles, and so was suspected of being a mere tool in the hands of the 'have' as distinguished from the 'have-not' powers, secession from the League was easy, its representatives are sent by the Governments and are not elected by the people of the member-States, the League lacks all sovereign power The 'failure' of the League must, however, be mainly attributed to the fact that too much was expected of it To expect that the establishment of the League of Nations would mean the elimination of power from international relations, and the substitution of discussion for armies and navies was but wishful thinking Power held in reserve has always played an important part—both before the League was founded and after—in international politics The best evidence for this is the tendency in the politics of the League for the minor powers to follow the lead given by the greater

'The decisions on the application of sanctions against Italy in 1935-6 were, in effect, taken solely by Great Britain and

France, the possessors of effective military and economic power in the Mediterranean . . . When France was militarily supreme in Europe in the first years after the War, a number of smaller Powers grouped themselves under her aegis. When German military strength eclipsed that of France, most of these Powers made declarations of neutrality or veered to the side of Germany.<sup>1</sup>

Power then is a fact. The League could have succeeded in its primary object only if the statesmen in the powerful nations were prepared to use the power of their States on the side of the League and Collective Security. But events show clearly that the statesmen were not prepared for anything of the sort. 'When the Covenant appeared to require action which might have entailed practical consequences for the mass of the people, successive Governments preferred inaction.'<sup>2</sup> The best evidence of this is the unwillingness of Britain and France to apply 'oil sanctions' against Italy in 1936. Statesmen preached big things, but did little. Political hypocrisy reached its zenith.

'I cannot recall any time', Winston Churchill said, 'when the gap between the kind of words which statesmen used and what was actually happening in many countries was so great as it is now.'

The promoters of war were preaching peace.

Only the ideal of the League remains. In so far as it expresses and embodies the general interest of all nations in the preservation of peace, and makes such preservation a collective responsibility in which every nation must take a more and more effective share, it renders useful service, in other words, its merit lies in its potentialities, not in its actual achievements. Any State which wishes to avoid war has in the League the means of showing the world the genuineness of its wish. The shortcomings are not so much in the League as in peoples and their Governments, 'who even with the best intentions, are too often held back by timidity, by routine, by prejudice, and cannot see where their duty lies, or are not prepared to do it'.

## §6 A FEDERAL UNION?

The failure of the League experiment has given rise to new proposals regarding international organization. Thus Oscar Newfang suggests<sup>3</sup> the conversion of the League of Nations into

<sup>1</sup> F. H. Carr, *The Twenty Years' Crisis, 1919-39*, p. 134.

<sup>2</sup> *Ibid.*, p. 22.

<sup>3</sup> O. Newfang, *World Federation*, 1939.

a world federation. Only two changes are needed to bring about this desirable conversion—the development of the League Assembly into a world Legislature, and of the Council into a Cabinet and the grant of compulsory jurisdiction to the world court. The member-States would gradually transfer their armed forces to the central authority. They would further remove trade barriers. A world monetary and banking system would also come into being.

Streit contemplates<sup>1</sup> a federal union of fifteen democracies to start with—the United States, Great Britain, five of the dominions (Canada, Australia, New Zealand, South Africa, Ene), France, Belgium, Holland, Switzerland, and the four Scandinavian States (Denmark, Norway, Sweden and Finland), having between them a population of more than 300 millions. These States would hand over to the federal authority certain of their sovereign powers including, in the political field, the raising of armed forces, the conduct of diplomacy and the making of treaties and the decision upon peace and war, and, in the economic field, the regulation of tariffs, currency and immigration. We start with democracies (according to Streit) because the world order is to be based on the principle of freedom, and because common ideals of government among the units would facilitate the smooth working of the federation. Other States might later be admitted if they accept the ideals of the federal union.

Jennings puts in a plea<sup>2</sup> for a federation of Western Europe. To start with, it would include thirteen democracies, France, Germany (democratized), Switzerland, Luxemburg, Belgium, Holland, the United Kingdom, Ene, Denmark, Sweden, Finland, Norway and Iceland. With the extension of the democratic system to the other States in Europe, they may of course be admitted. Defence, foreign policy, commerce and inter-State trade would be the main federal subjects.

It is unnecessary to mention other proposals of a similar nature. They all agree in advocating a federal union of nations. A federal union means that in respect of the subjects transferred to the federal authority, the citizens of each member-State will have to obey a Government other than their own—a Government in which no doubt they will have *some*, but not the *sole*, voice.

<sup>1</sup> C. K. Streit, *Union Now*, 1939.

<sup>2</sup> W. Ivor Jennings, *A Federation for Western Europe*, 1940.



in determining policy. Federation essentially means a division of powers and double allegiance. It means nothing less than the surrender by the nation-State of part of its sovereignty. The minimum federal subjects, all our writers are agreed, are defence and foreign affairs, other common affairs may or may not be transferred to the federal authority.

The case for federal union is in theory unassailable—that the insecurity men live under cannot be ended without abolishing war and ensuring world peace, and world peace can be ensured only by establishing world government. This view is proved by the facts of history, positive and negative, the history of how individuals have been able to provide for their security through government, and the history of how States have been unable to provide for national security without a common government. In early societies the individual relied upon his own strength for security. At a later stage, he sought the help of neighbours; but his security did not become assured until a police force was permanently established, and the force at the command of the individual *pari passu* reduced. The overwhelming force at the command of the State is used to give security to all alike, to see that no one takes the law into his own hands. Disputes between individuals are referred to a common court and enforced by a common executive.

Nations have been passing through a similar evolution. At first each nation had to rely on its individual strength, then they tried alliances only to provoke stronger counter-alliances. The League of Nations has foundered on the rock of national sovereignty. It is indeed possible to argue that but for a series of accidents—the withdrawal of the United States of America, the absence of an Anglo-American guarantee to France, a vindictive peace—the League might have been stronger, but its fundamental weakness remains: it is not an agency of government. It has no money-raising or coercive power, and it is a lesson of history that a single, effective, acceptable authority throughout the whole area in which the peace is to be kept is a *sine qua non*. The League method cannot prevent war, because it cannot do justice when justice conflicts with sovereignty and because it leaves war as the ultimate instrument of international policy. The obvious remedy is to have a common coercive authority to enforce decisions on certain matters of common interest; that authority will

also, through its court, declare where justice lies in disputes between States

There is, secondly, the economic argument Ever since the Industrial Revolution, the countries of the world have become more than ever economically interdependent. Interdependence is a reality, the existence of separate States is a historical accident The sovereign State has therefore become an anachronism What concerns all must be decided by all. Nationalism must be equated with right.

Thirdly, the changes in the technique of war and the increased power of the means of destruction emphasize the necessity for preventing war The only alternative to it is the destruction of civilization

And, finally, while its practicability in the sense of the peoples concerned being persuaded to attempt it may be debated, there is no doubt that if, by some miracle, it is brought into existence it is practicable to work it. The history of federal Governments everywhere is conclusive evidence

But can the peoples concerned be persuaded to agree to join a federal union? While for the reasons given above, federalism may well be the ultimate objective, we perhaps do more harm than good by considering it as an immediate objective The pursuit of an unrealizable ideal may work havoc by diverting men's minds from the more essential and urgent duties A federal union must take into account not only the hopes but the experience of mankind The necessary conditions hardly exist as yet Lord Bryce has said that the permanence of an institution depends not merely on the material interests that support it, but on its conformity with the deep-seated sentiment of the men for whom it has been made It is futile to contend that there is anywhere, even in democratic countries, anything more than a superficial, and therefore deceptive, sentiment in favour of a super-State Instead, nationalism is a sentiment which makes the strongest emotional appeal That is the lesson of the League of Nations and of recent history Nations are unprepared for the least sacrifice of their sovereignty Further, passions of the most undesirable kind have now been let loose, providing the most unfavourable atmosphere for any consideration of union. A planned education of public opinion all the world over is essential before any such step can be thought of

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Part Two

POLITICAL ORGANIZATION



# BOOK I A HISTORY OF GOVERNMENT

## CHAPTER XII

### THE GREEK CITY-STATE

#### §1 • INTRODUCTORY

The history of political development shows that two types of States have existed, the primary external difference between which is one of size the city-State and the country-State. The former was the prevailing form of political organization and reached its greatest development in ancient Greece and Italy (e.g. Athens, Sparta, Corinth, Rome) though it was found also in medieval Europe (e.g. Venice and Florence). The country-State was found in the ancient and the medieval world as well, but it has attained its best development in modern history.

The city-State thus demands our first attention because chronologically it comes first, and has left its mark on history for all time, both on political theory and on political organization. It is true that the differences of scale in area and population and a different outlook on life produced by industrialism and modern methods of transport, finance and capitalist enterprise have produced fundamental changes in the modern State, but reflection shows that we have a great deal to learn from the city-State. The fundamental questions in Politics remain much the same: What are the purposes for which the State exists? What are the means of realizing them? What are the limits of political control? And in answering them with reference to the modern State, the political experience of the city-State and the philosophy based on such experience are invaluable.

#### §2 CHARACTERISTICS OF THE CITY-STATE

The Greeks called their State *polis*, 'a word which may have originally meant no more than a fortified position on a hill to which the inhabitants of the surrounding country could fly for refuge on the approach of an enemy', but in time it came to mean essentially a State in which the life of the people political, intellectual, and religious was focused on one central city. The city-

State was, therefore, an organized society of men dwelling in a walled town, the hearth and home of the political society, and with a surrounding territory not too large to allow all its free inhabitants habitually to assemble within the city walls to discharge the duties of citizenship

Two ideas were integral to it — it loved independence, it was small. The independence of each city was the one cardinal principle on which Greek politics was based. No Greek would willingly merge his city in any larger aggregate. For this reason, the ancient Greeks never succeeded in forming one single Greek State. This had its defects — city quarrelled with city, the quarrels ultimately leading to their collapse when a powerful State arose in the north under Philip of Macedon. The Greeks knew their weakness, but clung to their ideal. The attachment of the Greeks to their small States is explained partly by geography. Greece is a land of mountains and small valleys, the mountain ranges do not run in straight lines but, roughly speaking, rectangularly, dividing the land into little square boxes. Greece was, therefore, well adapted to be a country of separate communities. But geography cannot explain everything. This is shown by the fact that there were no mountains between Thebes and Plataea or between Argos and Sparta, yet the ideal of the small independent city-State persisted in those parts of Greece as well. A second reason may be sought in the independent spirit of the people. We shall perhaps be nearer the truth if, following De Coulanges,<sup>1</sup> we ascribe the separatist tendency to the religious belief of the people, the belief that the gods of one city rejected the homage and prayers of any one who did not belong to their city. Because the worship of one city was not followed by the men of another, the laws too must necessarily differ, for law in early days was intimately connected with religion. Each city had its own money which was marked with its religious emblem. Isolation was the law of the city. One result of this was that in every city the citizens were a closely restricted body. Birth within the city alone could normally qualify one for citizenship, to admit a stranger was to invite the risk that the purity of the sacrifices might be affected. Strangers were therefore admitted only under special conditions, care being taken to see that the admission had a measure of popular support.

<sup>1</sup> F. de Coulanges, *The Ancient City*, p. 270

### §3 ]      *CITY-STATE AND MODERN STATE*

The city-State was of necessity small of necessity, because the concentration of political, social and intellectual life at one central city (which was the political ideal of the Greeks) was possible only when the State was small. The city must be capable of being taken in at a glance both by eye and mind. According to Aristotle, the State should have more than ten thousand and less than one hundred thousand citizens. It should be large enough to be self-sufficing, but not so large as to prevent a unity of interest and feeling among its members. The larger the territory, the less truly would the inhabitants realize their membership of the city community. Besides, they would be apt to develop interests of their own apart from their interests as members of the State. Plato's ideal of the best State is that which approaches most nearly to the condition of the individual: if a part of the body suffers the whole body feels the hurt and sympathizes all together with the part affected. This ideal was possible of realization only if the State was small. To be a citizen of a State did not merely imply, in the Greek view, the payment of taxes and the possession of a vote: it implied a direct and active co-operation in all the functions of civil and military life. A citizen was normally a soldier, judge and member of the governing assembly, and all his public duties, he performed not by deputy, but in person, the gods of the city were his gods, its festivals he must attend. The city-State of the Greeks was therefore a community of persons who knew one another; it was not only politically self-governed, it facilitated also a large measure of social discussion.

There is a third characteristic which is connected at once with the independence and the small size of the city-State: its all-inclusiveness, to which we have already referred.<sup>1</sup> Before the claims of the State, all other human relationships took a secondary place.

### §3 CITY-STATE AND MODERN STATE COMPARED

We have noticed three characteristics of the ancient city-State: its love of independence verging on separatism, its small size, and the all-inclusive sphere of its activity. The modern State too loves independence, but the attachment to the laws and institutions of one's own State leading to the dislike of those of the stranger is not characteristic of it, except perhaps in the aggressively national

<sup>1</sup> See above, p. 102, for illustrations see §10 below.



State. The general acceptance by modern States of international law is the best proof of this difference. There are also a number of resemblances in the political and economic institutions and religion of many modern States, these resemblances being partly due to conscious imitation.

The modern State is a country-State, larger in size than the city-State. It does not, unlike the ancient *polis*, give undue prominence to the capital city as the centre, the heart and life, of the nation. The citizens of Attica called themselves Athenians, after Athens, the capital city, this is an index to the fact that the citizens of the whole State identified themselves with the central city. The citizens of India are not known as Delhians, or of Britain, Londoners. The citizen, according to Aristotle, must be capable of ruling and being ruled, the small size of the city-State made it possible for its citizens to realize the ideal in a larger measure than is possible for the citizens of the modern State. The size of the ancient State explains also the difference between ancient and modern democracy where democracy existed in the ancient world public authority was directly exercised by its holders, the citizens appeared in large popular assemblies and directly decided important public affairs. Modern democracy is representative. Incidentally we may note that the institution of slavery existed in the ancient world, this to some extent facilitated the working of direct democracy by providing the citizens with the necessary leisure, the slaves looking after agriculture, manufacture and household services. In the modern State, slavery has generally been abolished.

And, thirdly, unlike the ancient State, the modern State recognizes (though with considerable variations both in theory and practice) limits to political control. In the city-State, 'man had only full rights *qua* citizen. Among the Greeks, private and public law were not yet distinguished. The Romans separated them in principle but their private law still remained completely dependent on the will of the people and the State. Individual freedom as against the State was not yet recognized'<sup>1</sup> But in the modern State, man has his rights as a person which are rather recognized than created by the State, and private law is sharply distinguished from public law. 'The free person is not absorbed in the State, but develops himself independently, and exercises

<sup>1</sup> Bluntschli, *The Theory of the State*, p. 59

his rights, not according to the will of the sovereign State, but according to his own '<sup>1</sup>

#### §4 ITS MERITS AND DEFECTS

The great merit of the city-State as a form of social and political organization was that it enabled a measure of unity to be achieved, hardly possible in the large modern State. Its small size and homogeneity made for social consolidation and integration. It could realize in a large measure the force of those natural and artificial ties which give strength and cohesion to a State, viz common race, language, religion, historic association, law and custom. The unity of the State enhanced the citizens' feeling of patriotism, their attachment to their State was indeed remarkable. It was said of the Athenians 'They spend their bodies, as mere external tools in the city's service and count their minds as most truly their own when employed on her behalf' Their citizenship was a dedication to the service of the State, an identification of the interests of the individual with those of the State. Above all, with Freeman,<sup>2</sup> we may add that such a system as this calls forth the powers of man to their very highest point, there has never been another political society in the world in which the average of the individual citizen stood so high as it did under Athenian democracy in the days of its greatness. Truly may it be said that the Greeks proved for the State how

'In small proportions we just beauties see,  
And in short measures, life may perfect be '<sup>3</sup>

The city-State had its defects. The institution of slavery, which was the foundation of the city-economy, was obviously one. Secondly, the small size of the State, the source of many of its merits, was also a source of difficulties. At a certain stage in the development of the State, when *stasis*<sup>4</sup> or internal feud appeared, it was all the more bitter because the two extreme sections of the people, the rich and the poor, lived within the compass of a small area. Externally, it was a bar to the expansion of the State: if it expanded either by becoming an imperial State or by becoming part of a federal State, it lost its true character and tended to decay. It was also too weak to defend itself against more power-

<sup>1</sup> *ibid*

<sup>2</sup> E. A. Freeman, *Comparative Politics*, p. 93

<sup>3</sup> Quoted by Ruthnaswamy in *The Making of the State*, p. 35

<sup>4</sup> See below, ch. XIII, §9

ful country-States, which had generally greater resources and a larger population. And, thirdly, its conception of the relation between the State and the individual was not altogether satisfactory, it did not recognize, as we must, that there are limits to political control.

### §5 ORIGIN OF THE CITY-STATE

Before the rise of the city, the Greeks lived in village communities. The village community was a group of families whose members were, or believed themselves to have been, descended from a common ancestor, and they bore his name. They participated in a common worship, the land which they cultivated was held in common by all the families in the village, and the village was ruled by a headman, the head of that household which was considered as being nearest of kin to the original ancestor from whom they traced their descent. The headman was also usually advised by a council of the heads of families.

That the city was formed out of village communities has been accepted by scholars. according to Freeman,<sup>1</sup> it hardly needs proof. And if evidence is needed, we can give it threefold. First, the political speculation of Greek thinkers assumed that the city-State had been built on the village community. Thus Aristotle defines the State as the union of families and villages having for an end a perfect and self-sufficing life. Secondly, traces of such communities were found in historical times in some of the less developed parts of Greece, e.g. in Aetolia. Thirdly, the city in its developed state contained survivals of the life of the village community in its *gens* or clan.<sup>2</sup>

The fusion of the village communities into a city-State was sometimes brought about by compulsion by powerful kings. Sometimes it was voluntary. The greater protection which the walled city provided against enemies was a powerful incentive. a hill fort would thus be a convenient nucleus for the growth of the city. Athens, for instance, gathered round the holy rock of Athena later known as the Acropolis. The provision of improved facilities for trade or manufactures when a number of people were gathered together in one place was another incentive. Briefly "they went to find efficiency". They discovered, in the fine phrase

<sup>1</sup> *op. cit.*, p. 86

<sup>2</sup> W. W. Fowler, *The City State of the Greeks and Romans*, pp. 36ff

of Aristotle, that though they could live out in the country, they could 'live well' only in the city. Doubtless, there were difficulties to be overcome. One of the foremost was, as De Coulanges has insisted, that of persuading the communities to forsake their separate individual worships and accept the new common worship. Thus when Theseus tried to unite the twelve groups which later coalesced into Athens, he had first to persuade them to adopt the worship of Athena, every community preserved its ancient worship but also adopted the one common worship.

The city is thus explained. To understand the *city-State*, however, we need to take into account other factors as well. For the significant fact about the city-State was not city life, but that the small State refused to merge itself in a larger whole, and embraced the entire life of man in community, religion and law, morals and art, culture and science, all focused on a single city. Three reasons explain this, as we have noticed in a previous discussion,<sup>1</sup> viz. the lie of the land, the independent spirit of the Greeks and their religious beliefs.

## §6 THE GOVERNMENT OF SPARTA

In this short history of government, it is not necessary to sketch the constitutions of all city-States, it is sufficient to give an outline of the system of government in two important States (Sparta and Athens), and give a brief résumé of the general features of Greek constitutional development.

Sparta, in the south of Greece, was formed by the union of five villages, and soon became the dominant State in that part of the land. The original Spartan constitution consisted of three elements, kings, a Council of Elders, and an Assembly of the people, of these, the kings had the greatest power. In time, the power of the kings declined, and that of the council and the people increased. In the fifth century B.C., the developed Spartan constitution was as follows,

There were two kings of equal power. Kingship was hereditary, but in a singular way, for the king was succeeded not by his eldest son, but by the eldest son born after his accession to the throne. It was partly because there were two kings, the one to check the other, that kingship was not abolished in Sparta.

<sup>1</sup> See above, p. 168

The functions of the kings were threefold . They were heads of the State religion, and in that capacity made sacrifices to the gods on behalf of the community . They were the supreme commanders of the army, and in the battlefield they had unlimited power of life and death . Two of the officers, known as the ephors, however, accompanied the kings to the field, not to share the command but to assist in negotiations after a victory or a defeat . The kings also had certain judicial powers, which were in fact connected with the exercise of their religious functions . they decided who was to marry an heiress whose father had died without betrothing her (to secure the maintenance and transmission of the family worship) , they had jurisdiction in cases of adoption and judged matters concerning public roads . (This was connected with religion because, in the ancient world, the boundary stone was sacred, and questions about the demarcation of property would depend largely on religious tradition )

Next came the Council of Elders or the Gerousia, composed of the two kings, and twenty-eight other members elected by the people for life from members of the nobility over sixty years of age . As a deliberative body, it discussed and prepared the business for the Assembly , as an administrative body, most matters of routine administration were within its competence , as a court of justice, it tried criminal cases

The Assembly (Apella) consisted of all citizens of pure birth, who had passed their thirtieth year and submitted to the discipline of the State <sup>1</sup> . Normally it met once a month , extra sessions could be summoned at such other times as the ephors, who presided over it, thought fit . The election of all officers and members of the Council was in its hands . It also decided (without, however, any discussion) questions of war and peace, and of disputed succession to the throne.

The board of five ephors was chosen by public vote every year . Any Spartan citizen was eligible for this office . They summoned and presided over the Assembly . They sat with the Council (perhaps presided over it) and brought all important business before it , shared its criminal jurisdiction and, as its executive officers, carried out its decrees . They had civil jurisdiction . To them 'the kings were entirely subordinate . Upon their approach, the kings rose . Yearly the kings took an oath to

<sup>1</sup> Described in §7

observe the constitution, and then the ephors promised to uphold their throne. They were allowed to fine and imprison the kings'. As has been noticed earlier, two of them accompanied the kings upon all campaigns. They were in charge of the relations of Sparta with foreign powers. They were also responsible for the strict maintenance of the order and discipline of the State. In their management was the secret police, whereby the surrounding masses of hostile peoples were kept in awe.

It is difficult to place this constitution under one of the usual categories—monarchy, aristocracy or democracy.

'Historically', says Greenidge,<sup>1</sup> 'Sparta is a balance of the three numerical elements of sovereignty: the nobles limit the king, and the demos the nobility, and all three are found finally together in a condition of stable equilibrium. But analytically we should be inclined to recognize only two elements, and to pronounce the constitution a dynastic oligarchy of a mild type modified by a strong democratic element'.

The dynastic element is found in the power of the Gerousia, it is mild because the members of the body are elected by the people. The democratic elements are obviously the Assembly and the ephors. All citizens are members of the Assembly; it chooses the Elders and ephors and ratifies, or not, the Council's acts. The ephors are annually elected, and as elected officers exercise vast powers.

## §7 THE STATE AND THE INDIVIDUAL IN SPARTA

It has been said in a previous section that the subordination of the individual to the State was a characteristic of all Greek States, nowhere perhaps was the idea so fully carried out as in Sparta. The citizens lived under a lifelong iron discipline, which was almost military in its nature. The discipline indeed began with birth. As soon as a child was born, it was visited by Spartan elders, to examine whether it was in any way deformed or obviously unhealthy.

'If so, the child must not be allowed to grow up "a feeble wielder of the lance" or to be the mother of children inheriting perhaps her own weakness. It was therefore immediately after birth exposed halfway up the side of Mount Taygetus, and allowed to die almost before it had begun to live'.

<sup>1</sup> A. H. J. Greenidge, *A Handbook of Greek Constitutional History*, p. 107.

If the child was normal, it was given back to its parents to be brought up by them, subject, however, to regulations prescribed by the State in the interests of its health and strength.

At the age of seven years, the male child was taken from its parents and was, through life, subjected to a severe discipline under the care of the State<sup>1</sup> Throughout his life, as boy, youth, and man, the Spartan citizen lived habitually in public, always either himself under drill, gymnastic and military, or a critic and spectator of others, always under the fetters and observances of a rule partly military, partly monastic, a stranger to the privacy of home, seeing his wife, during the first years after marriage only by stealth, and maintaining little intimate relationship with his children The supervision not only of his fellow citizens, but also of authorized censors or captains nominated by the State, was perpetually on him his day was passed in public exercises and meals, his nights in the public barrack to which he belonged. Besides military drill, he also became subject to severe bodily discipline of other kinds, calculated to impart strength, activity and endurance To manifest a daring and pugnacious spirit, to sustain the greatest bodily torture unmoved, to endure hunger and thirst, heat, cold, and fatigue, to tread the worst ground barefoot, to wear the same garment winter and summer, to suppress external manifestations of feeling, and to exhibit in public, when action was not called for, a bearing shy, silent and motionless as a statue—all these were the virtues of the accomplished Spartan youth Besides the various descriptions of gymnastic contests, youths were instructed in the choric dances employed during festivals of the gods, which helped to give them regulated and harmonious movements Hunting was encouraged as a means of inuring them to fatigue and privation. The nourishment supplied to the youthful Spartans was purposely kept insufficient, but they were allowed to make up the deficiency not only by hunting but by stealing whatever they could lay hands upon, provided they could do so without being detected in the act in which latter case, they were severely chastised!

The Spartan was not only compelled to concentrate his attention on military excellence, but was completely cut off from all commercial pursuits and even from agriculture The accumula-

<sup>1</sup> G Grote, *History of Greece*, Vol II, pp 297ff This paragraph in the text is largely based on the sketch given by Grote

tion of wealth was severely discouraged, and the possession of gold or silver punished with a fine

## §8 THE CONSTITUTION OF ATHENS

The early history of Athens resembles that of most other Greek States in the general fact that a monarchy, limited in some ways by the powers of a Council of nobles and of an Assembly of the people, passed into an aristocracy, which in turn gave place to a democracy. When the Government had become fully democratic in the days of Pericles (c. 500-429 B.C.) its main institutions were —

(i) *The Assembly (Ecclesia)* All citizens, above a certain age, probably above twenty,<sup>1</sup> were eligible to attend it. Normally, it met forty times a year, extraordinary sessions were also held when necessary. In order to ensure the attendance of as many citizens as possible, it was ordered that at the time of the Assembly meetings the shops should be kept closed. A member of the Council of Five Hundred, chosen by lot, presided over the meeting. Any citizen was at liberty to address it. The Assembly decided every important matter concerning the State, from its decisions, there was no appeal.

(ii) *The Council of Five Hundred (Boule)* The members of this body were chosen by lot from citizens over thirty years of age, fifty being chosen from each of the ten tribes into which the population of Athens was divided. We have it on competent authority that the office was not felt as a burden imposed on the citizens, 'the candidates presented themselves voluntarily, and competition for membership was keen, since the functions of the post were dignified and important, and the services well paid'. The Council prepared all business for the Ecclesia, and it had to see that the decisions of the Ecclesia were properly carried out. Briefly, it was the permanent Government of Athens, unlike the Assembly it sat throughout the year. For convenience, it was divided by tribes into committees of fifty members each, each presiding tribe sitting in turn for a tenth of the year. The chairman was chosen by lot from the presiding tribe for one day. It looked after the routine administration of the State such as super-

<sup>1</sup> A. J. Grant, *Greece in the age of Pericles*, p. 146. Greenidge, however, says that all citizens over eighteen years of age could attend. See Greenidge, *op. cit.*, p. 169.



intending the building of ships and the construction of public works, controlling the details of expenditure, looking to the upkeep of the cavalry and to poor-relief, conducting negotiations with foreign States, etc

(iii) *The Areopagus* This was a council mainly composed of men who were or had once been archons (executive officers). All the members sat for life. At one time it was a political power, but at the time of Pericles it had only some criminal jurisdiction and a general power of religious supervision.

(iv) *The officers* Nearly 95% of the offices, including those of judges, finance officers, auditors of public accounts, commissioners of roads, commissioners of weights and measures and keepers of the State gaol, were filled by lot. The incumbents held office for one year, and, Aristotle tells us, except in the case of the Council of Five Hundred, no one might hold office a second time. The lot secured absolute political equality, but in order to prevent the occupation of office by wholly unworthy and incompetent men, two safeguards were provided. First, an examination of the candidate was held after the lot had fallen upon him, but before he entered on the duties of his post. Second, each official had to undergo an examination when he laid down his office. Incapacity and dishonesty could then be punished.

Further, the Athenians realized that there were some functions which required more than mere common sense and general ability, e.g. commanding the army and looking to the water supply of the city. Obviously such posts could not be fulfilled adequately by men chosen by lot. Generals and commissioners of springs were therefore chosen by election.

(v) *The popular jury court (Heliaea)* This was composed nominally<sup>1</sup> of six thousand Athenian citizens over thirty years of age, chosen by lot at the beginning of each year. These six thousand were again divided by lot into ten sections of five hundred each, thus leaving a reserve of one thousand. When there was a case to be heard, lot was cast to decide which of the juries was to hear it. Service in the jury court was paid, but was not compulsory. It must be mentioned, too, that petty cases were

<sup>1</sup> Greenidge (op. cit., p. 175) has pointed out that the traditional six thousand, if not an exaggeration, was probably a nominal number on account of the extreme improbability of so many duly-qualified citizens serving in the same year.

## §9] *ATHENIAN AND MODERN DEMOCRACY*

decided without reference to these jury courts, by arbitrators who were selected by lot from citizens sixty years of age.

The account given above shows that the government of Athens in the fifth century B.C. was a full-blown democracy. sovereignty lay with the people themselves, and there was political equality. This equality was not in name only, the institutions of government were such as to ensure its realization in practice, the system of lot, of short tenure of office and payment for public service<sup>1</sup> were particularly useful in providing opportunities for government service for rich and poor alike.

## §9 *ATHENIAN AND MODERN DEMOCRACY*

By democracy we mean that form of government in which the ruling power of a State is legally vested not in any particular class or classes but in the members of a community as a whole. In this sense the constitution of Athens was clearly democratic so are the constitutions of modern Britain and the United States of America. But there are important differences between ancient and modern democracy.

Modern democracy is representative, indirect, the people govern through representatives periodically elected by them. The ordinary citizen's part in government is limited. Periodically he may vote to choose a member of Parliament from his constituency. If he has the necessary qualifications, he has the right to stand as a candidate for election and to apply for executive and judicial posts, but in practice only a very small proportion of citizens can ever hope to be elected to the Legislature, or chosen for executive or judicial office. He has the right to criticize the Government and influence public opinion, through the freedom of speech, press and association, the effectiveness of his criticism obviously depends upon his ability and resources. In some countries, like Switzerland and the United States of America, the citizen has opportunities of 'direct legislation', through the referendum and the initiative. The referendum is the submission of a measure passed by the Legislature to popular vote for final sanction, the initiative is an arrangement by which a prescribed

<sup>1</sup> In the days of Pericles, there was no payment for attendance at the Assembly, this was introduced later, about the beginning of the fourth century B.C.

number or proportion of the people may initiate the proposal for a law to be later confirmed by popular vote. More direct part in government is taken by the people in the smaller cantons of Switzerland and the townships of New England in the U.S.A., where the qualified citizens meet to decide important issues; but this participation is in municipal affairs, and not in those of the central Government.

Ancient democracy was direct, primary. When the Athenians called their constitution a democracy, 'they meant literally what the word itself expressed—that the people itself undertook the work of government.' Their Assembly, in which every citizen could take part, was the sovereign body in the State to decide national affairs, great and small. The opportunity for the citizen to take part in the executive and judicial administration of the State was considerable. Unlike in modern times, there was no permanent bureaucracy or Judiciary who looked to the executive and the judicial work, these were undertaken for short periods by ordinary citizens. The systems of lot and election, payment, and short tenure of office, ensured equal opportunity for all. On the authority of Aristotle it has been reckoned<sup>1</sup> that, excluding those employed on military duties, there were 'ten thousand officials in a State whose total number of citizens certainly did not amount to much more than twice that number.' In practice, therefore, every Athenian citizen probably held an official post of some sort once in his life, very many must have held such posts many times. Citizenship was rightly defined as the capacity to rule and be ruled.

It need hardly be added that it is impossible to apply the principles and methods of ancient democracy to modern conditions. The ancient city-State was small, it was a slave-owning democracy, and its industrial life was less complex than the modern. But the ancient conception of citizenship may be usefully assimilated by citizens in modern States so that they may take an intelligent and active part in the problems of the State and make their citizenship a dedication to the service of the State.

<sup>1</sup> A. J. Grant, *op cit*, pp. 150-1, Aristotle, *On the Constitution of Athens* (tr. E. Poste) pp. 42-3. Compare W. W. Fowler (*op cit*, pp. 166-8), who arrives at a total of 1,900 officials out of an adult male population of about 30,000. Fowler, however, does not take into account the jurymen and others included by Aristotle in arriving at his total number.

§10 RIGHTS AND DUTIES OF CITIZENSHIP  
IN ATHENS

Rights in the legal sense are privileges or immunities upheld by the State; duties are obligations. Besides the usual civil rights, such as the right to life, personal freedom, property, contract, etc., the Athenian citizen in the days of Pericles had, as we have seen, a number of political rights which enabled him to have an effective share in his Government: the right to attend meetings of the Assembly, to debate and vote, the right to have his name included in the lists for offices in the State to which the system of lot applied, the right to take part in the election to certain offices, and the right to be paid for service to the State. The short tenure of most of these offices enabled the citizens to enjoy their rights in 'widest commonalty'. Truly citizenship was the capacity not only to be ruled but to rule.

'An Athenian citizen', said Pericles in his famous funeral oration, 'does not neglect the State because he takes care of his own household, and even those of us who are engaged in business have a very fair idea of politics. We alone regard a man who takes no interest in public affairs, not as a harmless, but as a useless character, and if few of us are originators, we are all sound judges of policy'.

The effective performance of these civic duties was of course helped by the institution of slavery and the small size of the State, in particular the latter facilitated a large measure of social discussion. Athens believed in the utility of discussing public questions. Again to quote Pericles:

'The great impediment to action is, in our opinion, not discussion, but the want of that knowledge which is gained by discussion preparatory to action. For we have a peculiar power of thinking before we act and of acting too, whereas other men are courageous from ignorance but hesitate upon reflection'.

Regarding duties, it is perhaps sufficient to state that generally, as according to the Athenian conception the State was all-inclusive, there was no limit to the *possible* interference by the Government with the life of the individual, i.e. to the imposition of duties on him. The citizen could be required to devote himself entirely to the State, the whole was more important than the part.

'A State confers a greater benefit upon its private citizens

when as a whole commonwealth it is successful, than when it prospers as regards the individual but fails as a community. For even though a man flourishes in his own private affairs, yet if his country goes to ruin he perishes with her all the same; but if he is in evil fortune and his country in good fortune, he is far more likely to come through safely'<sup>1</sup>

The specific duties of the Athenian citizen were

(i) *Religious* He must believe in the gods of the city, be present at the purification ceremony and have his name enrolled in the census, take part in the festivals of the national gods, and in the common meal, if selected for the purpose by lot

(ii) *Private* He must marry,<sup>2</sup> the law forbidding men to remain single. He could not take more than three dresses on a journey<sup>3</sup>

(iii) *Political* At a time when discords were frequent, the Athenian law permitted no one to remain neutral; he must take sides. He had to serve as arbitrator, if selected for that post by lot

(iv) *Financial* It would appear that property taxes under democracy were imposed from about 429 B.C.<sup>4</sup> The heaviest burden of taxation fell upon the richer citizens, who were required to expend large sums in the performance of public services called liturgies, e.g. the training of a dramatic chorus for the religious festivals and the keeping of a warship in commission for a campaign

(v) *Military* All citizens had to serve in one or another branch of the army. The cavalry was recruited from the richer classes, who could afford to keep horses. All other men fit for service were enrolled in the classes as they came of age. They served from the age of fifteen to sixty

## §11 GREEK CONSTITUTIONAL DEVELOPMENT

### *Monarchy*

The earliest form of government in the city-States of Greece<sup>5</sup> was monarchy. The king was believed by the people to derive his descent from the gods, kingship passed from father to son.

<sup>1</sup> Thucydides, *Works* (translated by C. F. Smith), Vol. I, p. 363

<sup>2</sup> De Coulanges, *op. cit.*, p. 293

<sup>3</sup> *ibid.*, p. 294

<sup>4</sup> R. J. Bonner, *Aspects of Athenian Democracy*, p. 95

<sup>5</sup> Examples of Greek city-States, besides Sparta and Athens, are Corinth, Argos, Megara, Thebes

## §11] GREEK CONSTITUTIONAL DEVELOPMENT

The king was accorded various privileges and honours a royal domain, the seat of honour at feasts and a choice share of booty taken in war and of food offered at sacrifices. He was priest, judge, and leader in war. He sacrificed to the gods on behalf of the people, as every father of a family did for his household. He decided disputes between families or members of families, his decisions were unquestioningly accepted by the people.

Besides the king, there were a Council of Elders, composed of the heads of clans, and an Assembly of the people. The Council was normally consulted by the king, though he was not bound to follow its advice. All freemen had the right to be present in the Assembly and to take part in the acclamation with which the proposals of the king and the Council were greeted. There was no general discussion, the king and the elders alone having the right of speaking. The effective power of the Council and of the Assembly no doubt depended on the personality of the king, according as to whether he was of a character to need their help or dispense with it.

By the middle of the eighth century B.C., monarchy everywhere began to decline. The increasing power of the nobles, and the tendency to arbitrary government by the kings contributed to this decline. The small size of the city-State was another factor of some importance. In a small State, the mistakes and vices of the king are easily noticed and become the subject of criticism, criticism leads to discontent and discontent grows into opposition. Further, 'the small size of the city rendered a bond of unity superfluous and the symbol unimpressive.'

### *Aristocracy*

Monarchy gave place to aristocracy<sup>1</sup>—literally, the rule of the best, in effect, government by the few nobles. The mode of transition differs from State to State. At Corinth, it is said that in 745 B.C. the members of the royal family, two hundred in number, deposed king Aristomenes and took the control of the

<sup>1</sup> It is perhaps worth observing that other causes besides the decline of monarchy helped the rise of aristocracies. (i) The limitation of the numbers of fully qualified citizens by the exclusion of the conquered from political power in States founded on conquest, such as Sparta. (ii) Inequality of wealth and (iii) the importance attached to cavalry in warfare in this period. This last factor meant that only the rich could afford horses and cavalry equipment, and their military superiority was transferred to the sphere of politics.

Government into their own hands, electing one of their own number every year to act as president and discharge the functions of king. At Athens, on the other hand, Aristotle tells us that the Government was controlled by a permanent council of nobles, and its details were managed by nine archons selected annually by the Council. We may, however, observe some common features of the aristocracies: the concentration of power in a few privileged and wealthy nobles, and the distribution of the functions of administration, including religious duties, among a certain number of men elected by the nobles.

Aristocracies played a valuable role in the political development of Greece. They worked out the idea of public duty, the idea 'that the mind and the body alike of each individual should be cultivated to the utmost benefit of the State'. The honourable pride of noble descent led the nobles to cherish the idea, and set an example, of unselfish devotion to the State. Secondly, they planted Greek cities in distant lands and thus helped in the process of Greek expansion. Thirdly, they helped in elaborating the political machinery of the States.<sup>1</sup> This was indeed inevitable, for new machinery had to be created to replace the monarchical part of the older constitutions which had disappeared. The new ruling class had perforce to create new magistracies, determine the term of their office and the limits to their power. And, lastly, under them the idea of law began to take a clearer shape in men's minds, and the traditions which had guided usage began to assume the form of laws, embodied in written codes.<sup>2</sup>

### *Oligarchy*

Aristocracy tended towards oligarchy, i.e. the selfish rule of the wealthy few. It is not so much a new form of government as the perversion of an old one. The perversion was apparent when privilege and exclusiveness began to be used for the oppression of the common people. The nobles alone knew the secrets of religion and the rules of law, they not only used them to their advantage but began to despise the commoners. They monopolized the ownership of land or encroached on common rights; oppressed the smaller cultivators, harassed the debtors to whom they had lent money on the security of their persons and, in general,

<sup>1</sup> J. B. Bury, *A History of Greece to the death of Alexander the Great*, p. 76.  
<sup>2</sup> *ibid*

## §11] GREEK CONSTITUTIONAL DEVELOPMENT

al, made themselves hated. The best proofs of this perversion of oligarchy are perhaps the oligarchic oath quoted by Aristotle<sup>1</sup> ('I will be adverse to the common people, and contrive all I can against them') and, conversely, the general support given by the common people to the 'tyrants', who championed their cause against oligarchies.

### *Tyranny*

These 'tyrants' make their appearance in Greece from about 600 B.C. to about 500 B.C. Invariably, they came to power by taking up the cause of the oppressed section of the people against the oligarchs, and retained it with the help of the mercenaries. Pisistratus of Athens is a typical example. About 560 B.C. he put himself at the head of the discontented poor in the State.

'One day when the market was at its fullest Pisistratus appeared riding in a chariot. The horses and car were sprinkled with blood and the owner himself was wounded. The people quickly crowded round to hear what had happened. They were told that his life had been attempted by his enemies in the opposing parties. Before they had time to recover from their surprise, one of his friends jumped up in the crowd and proposed that, to prevent the repetition of so terrible an event, a bodyguard should be given to Pisistratus to defend his person.'<sup>2</sup>

The bodyguard was given, it soon increased to a small army. Pisistratus seized the Acropolis and made himself master of the State. Later, he surrounded himself with a strong body of foreign mercenaries to maintain himself in power.

Though tyrants came to power in an unconstitutional manner, by the use of force, many of them did useful service to their States. For instance, Pisistratus himself at Athens and Thrasybulus at Miletus took great interest in the welfare of their people, they encouraged art and literature, promoted commerce, planted colonies and developed the navy. Above all, they overthrew the hated oligarchies and paved the way for democracies. But, nevertheless, the 'tyrannis' was generally disliked in Greece, because it went against the Greek love of freedom. 'It placed in the hands of an unconstitutional ruler arbitrary control, whether he exercised it or not, over the lives and fortunes of the citizens.'

<sup>1</sup> *Politics*, 'Everyman's Library' edition, p. 166

<sup>2</sup> Alice Zimmern, *Greek History*, p. 89



It created a slavish feeling in subjects, and encouraged flattery. From the beginning of the fifth century B C it gradually declined<sup>1</sup>

### *Democracy*

Tyranny was in general replaced by democracy. Democracy stresses the principle of numerical equality, it asserts, as against monarchy and aristocracy, that the mere fact of free birth is sufficient to constitute a claim to a share in political power. Its working in ancient Greece is best illustrated in the government of Athens during the days of Pericles, to which we have already referred. It is sufficient to state here the general fact that there was a drift towards democracy in Greece from the beginning of the fifth century B C, and that democracies and oligarchies 'succeeded one another alternately in most of the cities till the battle of Chaeronea in 338 B C, put an end to the independence of the Greeks'.

## §12 THE LEGACY OF GREECE

We have earlier referred to the fact that in spite of the differences in size and outlook on life between the Greek city-State and the modern State, the latter has had much to learn from the former. The most valuable of these contributions, as has been well said,<sup>2</sup> is that the Greeks set up the first *Rechts-staat* of history, a State in which the laws held sway. 'The Greeks endowed law with all the attributes of majesty and placed it above the ruler and even above the people'. The civilized modern State has made the supremacy of law, as distinguished from the caprice of an individual, part of its tradition, to the extent that a departure is attempted from this fundamental principle, as for instance in the Nazi State, there may be said to be a return to barbarism.

Secondly, the Greeks have left the moderns the results of their experiments in the art of government, these experiments were varied and rich indeed. They tried monarchy, aristocracy, oligarchy, tyranny and democracy, they tried the unitary State and the federal. After all, there is no new type of government left to invent, so that 'all that men can do is to ring the changes

<sup>1</sup> We cannot regard tyranny as a stage through which the Greek polity universally passes. We find it in Athens, Sicyon, Megara, Corinth, Miletus, we do not find it in Boetia, Sparta, Elis.

<sup>2</sup> Ruthnaswamy, *op cit*, p 34, and Gierke cited therein.

upon those which exist', and in this task the history of the Greek State is at once a guide and a warning. Of particular interest in this regard is the analysis of different forms of government, an account of their strength and weakness, left us by the Greek thinkers, Plato and Aristotle. Plato has, for instance, shown that ignorance, injustice, and political selfishness are the great defects of the democracy with which he was familiar. The greatest problem of modern democracy is how to overcome these same defects. By his insistence on true knowledge as the qualification for rulers, Plato also teaches us the lesson that good leadership in the State is at least as important as the ballot-box for its well being.

In the field of political ideals, again, the modern State has quite a lot to learn from the ancient State and its thinkers. The purpose of the State is to develop the good life, there is no distinction between public and private morality, for, if the State itself is immoral, it cannot make its citizens moral; citizenship is the capacity to rule and to be ruled, true politics can be built up only on the study of human nature as it is, and not on a fanciful conception of what man and the world ought to be; revolutions are caused by the craving of men for equality, and their best preventives are the encouragement of the middle classes in the State and 'education in the spirit of the constitution'. These are political lessons which mankind can forget only at their peril.

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## CHAPTER XIII

# THE GOVERNMENT OF ROME

### §1 MONARCHY

Rome made her appearance in history as a monarchic city-State, she achieved her greatness as a republic, in the period of her decline she was imperial and despotic

The royal period lasted from the foundation of Rome (about 753 B.C.) to 510 B.C. At the head of the State was the king or rex. The method of electing the king shows that Roman kingship was a compound of three elements. The king was at once the hereditary and patriarchal chief of the people, the chief priest of the community, and the elected ruler of the State. On the death of a king, the sovereignty of the State reverted to the Council of Elders, they nominated a temporary king (interrex), who held office for five days, he nominated another elder with whom lay the actual designation of the new king. Finally, the choice to kingship was approved by the assembled people, and the vote of the people was ratified by the approval of the gods, as given in the ceremony of inauguration. Once elected, the king ruled for life. He was the sole ruler and his powers were expressed by the word 'imperium'. The imperium of the rex was technically unlimited, both in peace and in war. He was supreme judge, high priest and commander-in-chief in war. All officials were appointed by him. There were, however, two customary limitations to the king's absolutism. He was expected to consult the Council of Elders (the Senate) and, probably, to follow their advice, and he had to submit to the people for their final decision cases involving capital punishment.

By the side of the king stood the Senate of about 300 members selected by the king for life. It was their privilege to appoint the interrex on the death of a king, they were consulted in the choice of the new king, and their sanction was necessary to ratify the vote of the assembled freemen. But they were not supreme, for the choice of the king needed ratification by the community, and the king was not bound to accept the advice they tendered.

## §2 ] *THE GROWTH OF THE REPUBLIC*

The free citizens voted by 'curiae' in the Assembly of the people, and hence its name the *Comitia Curiata*. The curiae were religious as well as political groups which had developed a close corporate life, each with its peculiar worship, place of worship, priests and festivals. There were thirty such curiae in Rome. A majority of the members of a curia decided its vote and the decision of the Assembly was determined by the majority of the groups. The Assembly met at the summons and under the presidency of the king or of the *interrex*. It had the right to elect the king, but, as we have seen, this right was limited to the acceptance or rejection of the man named by the *interrex*. The *Comitia Curiata* could also hear capital cases if submitted to it by the king. It was also summoned to witness religious rites, the making of wills and adoptions.

During this monarchical period, political rights were given only to one part of the community, the patricians, the remainder, without political rights, were known as the plebeians. Under the later kings, the pressure from the plebeians for some share in the government became strong and led to the organization of a new Assembly, the *Comitia Centuriata*, in which both the patricians and the plebeians had a place. The name was derived from the century,<sup>1</sup> which was the unit of voting in the Assembly. The purely patrician body, the *Comitia Curiata*, however, continued to exist.

In 510 B.C. Tarquin the Proud, the last of the kings, was expelled from the State and the republican era began.

## §2 THE GROWTH OF THE REPUBLIC (510-287 B.C.)

On the abolition of kingship, the power of the king, both civil and military, was vested in two annually-elected officers, the consuls. Besides the short term of the consulate, its dual character was another check on the power of the consuls, for one consul could forbid what his colleague had enjoined. Further, a consul was compelled to allow an appeal to the people against a sentence which affected the life or status of a citizen.

Rome had become a republic in the sense that monarchy had been abolished, and the monarch's power transferred to elected heads, but the institution of the Republic did not, as yet, mean

<sup>1</sup> The century is most likely a military term used to denote a small division in the army which nominally contained about 100 men.

that the people had equal political power. The plebeians were subject to three kinds of disabilities, political, economic, and social. They, being poorer than the patricians, were always a minority in the *Comitia Centuriata*,<sup>1</sup> they could not hold political office; and, besides, the patricians had entire control of the administration of the law, which was unwritten. The law of debt was harsh, and the public land and pastures were allotted only to patricians. The plebeians could not contract legally valid marriages with patricians.

The plebeians naturally desired to have these disabilities removed and to acquire political, economic, and social equality with the patricians. The patricians tried to retain their privileges as long as they could, but, on account of pressure from the plebeians, were forced to give them up one by one. The first success of the plebeians was the institution of the office of the tribune in 494 B.C. to protect them against oppression by patrician magistrates. In the same year a new Assembly, called the *Concilium Plebis*, composed exclusively of plebeians, came into being. The *Concilium Plebis* and the tribune became the instruments through which the plebeians carried on their struggle for equality with the patricians. From 456 B.C. the public lands of the State were given to plebeians as well as to patricians. The laws of the State were codified in the Twelve Tables (451 B.C.). It was declared in 449 B.C. that laws passed by the *Concilium Plebis* were binding on the whole people, if confirmed by the *Comitia Centuriata*. Four years later intermarriage between the two 'orders' was legalized. The offices of the consul, dictator, and praetor (judge) were thrown open to plebeians in 367 B.C., 356 B.C., and 337 B.C., respectively. In 339 B.C. it was ordered that one censor must be a plebeian. Finally in 287 B.C., the laws passed by the *Concilium Plebis* were declared to be binding on

<sup>1</sup> The predominance of wealthy men in the *Comitia Centuriata* (Assembly of the Centuries) is evident from the following table

CLASS	PROPERTY QUALIFICATION	CENTURIES
First Class	100,000 <i>asses librales</i> (copper pounds)	80
Second Class	75 000       ,,	20
Third Class	50 000       ,	20
Fourth Class	25 000       ,,	20
Fifth Class	11 000       ,,	30

One vote was given to each century, and the First Class, though least numerous, was divided into 80 centuries. See A. H. Allcroft and W. F. Masom, *Tutorial History of Rome*, 4th ed., p. 78.

### §3] CONSTITUTION IN THE THIRD CENTURY B C

all the people without ratification by any other authority. With the establishment of political equality between the two classes, which this law marks, the 'struggle between the orders' was over

### §3 CONSTITUTION IN THE THIRD CENTURY B C.

We may now sketch briefly the republican constitution of Rome after the struggle between the 'orders' was over

#### *Executive officials*

(i) Two consuls were elected annually by the *Comitia Centuriata*. They took command abroad, represented the State in dealings with other States, punished those who withstood authority, summoned and presided over the Senate, had power to issue proclamations and were the heads of the civil administration

(ii) Six praetors were elected annually by the *Comitia Centuriata*. Two of them acted as judges at the capital, four were sent out to administer the provinces of Rome, such as Sicily and Sardinia

(iii) Two censors were elected by the *Comitia Centuriata* for eighteen months. They had charge of finance, revised the census and framed the list of senators

(iv) Four aediles were elected annually. Two were known as the *curule aediles*, and were elected annually by the *Comitia Tributa* from among the patricians and the plebeians in alternate years. The other two were elected from the plebeians annually by the *Concilium Plebis*. They acted as assistants to the consuls in the administration of the city, took charge of public records, public buildings, and water-supply, regulated markets and performed the police functions

(v) Eight quaestors were elected annually by the *Comitia Tributa* and acted as paymasters of troops, and were guardians and collectors of revenue

(vi) Ten tribunes were elected annually from among the plebeians. Their original and primary function was to protect those members of their 'order' who appealed to them personally for help against arbitrary acts or unjust sentences on the part of the magistrates. To enable them to perform this function adequately, the tribunes were given (a) the power to veto (*intercessio*) any order of a magistrate (except the dictator) which they thought was against the interests of their 'order', (b) the right of using

force (*coercitio*), and (c) the right of arresting anyone who withstood them (*prehensio*). It is no exaggeration to say that through the use of these powers the tribunate became a guardian of the whole State against the illegal proceedings of magistrates. In addition to these powers, the tribunes also had the power of eliciting resolutions from the Concilium Plebis and of acting with them in initiating legislation.

### *The assemblies*

There were four assemblies in Rome. The Comitia Curiata (in which the people voted by curiae) was the oldest but the least important at this time. The main constitutional function reserved to it was to pass formally the *lex curiata* which was necessary to enable the magistrates to exercise their powers. The Comitia Centuriata (in which the people voted by centuries) elected consuls, censors and praetors, enacted laws, had the exclusive right to declare war and heard cases involving the death penalty. The Comitia Tributa was yet another assembly. Here the people voted by tribes, of which there were thirty-five. It elected the quaestors and the curule aediles, shared with the Centuriata the power of legislation, and the curule aediles conducted before it certain classes of cases, e.g. those involving the charge of usury. The Concilium Plebis consisted of plebeians only. In this Assembly also, voting was by tribes as in the Comitia Tributa. It elected tribunes and two aediles, passed laws and heard appeals against fines imposed by a tribune or a plebeian aedile.

### *The Senate*

The Senate consisted of 300 members, the list being revised by the censors once every five years. The censors were expected 'to choose every most excellent citizen of any rank', all ex-magistrates were usually included in it. In theory it was only the advisory body to the consuls, it could meet only if summoned, and could not command magistrates to take any course of action. In practice, it was very powerful, indeed the most powerful body in the State. It exercised the power of previous deliberation on matters which had to be submitted to the people. It gave directions to the magistrates on the conduct of their administrative duties. It claimed the right of suspending a magistrate from his office, of exempting individuals from the operation of the law,

and even of declaring martial law. It pointed out flaws in legislative enactments and in effect revised them. Briefly, the assemblies and the magistrates deferred to the Senate in matters which they were authorized to decide independently.

This predominance of the Senate is explained by several factors. It was composed of the best men in the State. Its members had a long tenure of office. These two features of the Senate were in striking contrast to the relatively inexperienced character of the magistrates, and their annual tenure. The nature of the business which the Roman Government had to transact in an era of wars, conquests, and expansion, also contributed to the Senate's ascendancy, for it demanded men of experience and cool wisdom to direct the destinies of the State, the magistrates and the people were only too willing to be led by the superior wisdom of the Senate. Finally, the character of the Roman citizens was a helpful factor. They were mostly farmers, who were content to elect magistrates and express their opinions occasionally on projects of legislation, unlike the Athenians, they had neither the desire nor the ability to take a more active part in government.

This constitution was in theory democratic—the people meeting in their assemblies were sovereign in legislation, they decided on peace and war, they periodically elected their magistrates. Polybius, the historian of Rome (204-122 B.C.), after describing the several parts of the constitution, preferred to describe it as one 'in which the elements of monarchy, aristocracy, and democracy were all to be found, acting and reacting on each other in a perfectly happy and harmonious combination'. Our survey, however, would rather substantiate the verdict of Fowler<sup>1</sup> that it 'was neither a democracy, nor a mixed constitution, nor a government of the best men in the State, but an *oligarchy*—the most compact and powerful oligarchy that the world has ever yet seen'. The key to the understanding of the constitution lies in the power of the Senate.

#### §4 CHECKS AND BALANCES

The republican constitution that we have just described is remarkable for its system of checks and balances. The disposition of power was made in such a way that while the different agencies of government were assigned definite powers, they form-

<sup>1</sup> *The City-State of the Greeks and Romans*, p. 220



ed mutual checks and so were prevented from abusing their powers. Let us illustrate.

The consuls, as we have noticed, had wide powers which were succinctly summed up in the word 'imperium'. But there were several limitations to their power. They held office only for one year. They were expected to consult the Senate. Important matters affecting the welfare of the State had to be decided by the people. Cases involving capital punishment had similarly to be decided by the people. The tribunes could veto their acts. They could be tried for their mistakes after they had laid down their office. Above all, the collegiate nature of the consulate itself was a check. It was, however, characteristic of the system of checks and balances that the veto of the colleague was also limited. It had to be pronounced in person, the power could be exercised only against a magistrate and not against an assembly, it could not be resorted to on the battlefield and must be directed against a matter partially advanced toward completion. The tribunes, like the consuls, had important powers, but they too were checked by the collegiate character and the short term of their office, their veto, like that of the consul, had to be exercised in person and at the moment when the contemplated action was being taken.

The principle of checks and balances applied not only to executive officers, but to the Senate and the assemblies as well. Thus the Senate, with all its wide powers in practice, was in theory only an advisory body, its advice could be rejected. It could meet only if summoned by magistrates. The assemblies had, as we have seen, legislative, elective and judicial powers, but they too were in some ways limited. These bodies could meet only if summoned, there were several assemblies performing different functions and their power of discussion was not great.

## §5 THE FALL OF THE REPUBLIC

From about the middle of the second century B.C. we notice in Rome a tendency for republican institutions to fall into disrepute. The Republic had rested on four clear principles: divided authority, a short tenure of office for magistrates, the final decision of important matters of state by the people, and the refusal to give unlimited military powers to any magistrate within the city, the exercise of imperium within the city being limited by the right of appeal and by the tribunician veto. But time

and again, from 133 B C, wide executive-authority was concentrated in the hands of a single man specially designated by the vote of the people. Marius was consul six times, from 107 B C to 100 B C, Pompey was consul twice, in 70 B C and in 55 B C, and pro-consul and consul in 52 B C., Julius Caesar was made dictator for an indefinite period from 48 B C, was consul for five years, and was invested with other wide powers such as those of making war and peace and appointing governors to the provinces. The brilliant achievements of these men apparently justified the departure from the accepted republican principles. But, in reality, it was fraught with grave danger to the Republic. For, with the support of the army at their command and with their prestige as successful generals, these men were able to impose their will on the populace at home and transform the Republic into an effective despotism. This trend of events is clearly noticeable during the time of Julius Caesar, but becomes most marked during the principate of Augustus. The primary cause for this transformation of the Republic into the Empire was undoubtedly that by this time Rome had by conquest become mistress of vast dominions. Necessarily the governors sent to rule the distant parts of the Empire enjoyed wide discretion, and were practically independent of the home government. Briefly, the form of government adapted to a city-State was found inadequate for the task of imperial rule.

The principate of Augustus lasted from 27 B C to A D 14, it was so called because Augustus was first citizen, *princeps civium*. The principate was founded on the concentration in a single person of the essence of powers extracted from the chief republican magistracies, supplemented by a few special prerogatives. The two chief bases of the power of Augustus were

(i) The pro-consular imperium. This carried with it the command of the army and the fleet, and power over the most important provinces. It was essentially a military command, and normally it could confer no power within Rome. Augustus, however, was allowed to exercise it within the walls of Rome, he could therefore rule the provinces without leaving Rome. Besides, his pro-consular command was declared to be superior to that of other pro-consuls.

(ii) The tribunician power. In virtue of this he could control the magistrates and the Senate and exercise an unlimited

power of veto Both these powers he held virtually for life Besides, though technically he was not consul, he was granted equal rights with the consul of convening the Senate and introducing business, of nominating candidates for election by the people and of issuing valid ordinances He was also placed on a level with the consul in outward rank These arrangements preserved the forms of the Republic, while they recognized the authority of the man who was the effective master of the State

The Senate not only continued to exist but was nominally given added power Half the Roman provinces, the more settled ones, were given over to its administration It was given jurisdiction over important political cases within the city and appellate jurisdiction over cases from provinces With it rested the formal choice of the princeps, it enacted laws on domestic matters So great was the appearance of its power that the new government is sometimes described as a 'dyarchy', i.e. a system of dual control by the princeps and the Senate This was true only in appearance, for what the Senate did, it did with the permission of the princeps

The popular assemblies remained, but shorn of much of their former power They were hardly used as courts of appeal, popular legislation almost ceased The only power that remained to them was that of electing the officers of the State Even here their importance was limited in two ways the princeps 'recommended' candidates for their choice and, secondly, the officials appointed by the princeps tended to override consuls, praetors and others

The constitution under Augustus may properly be described as 'an absolute monarchy disguised by the forms of a commonwealth',<sup>1</sup> though Augustus himself might say, 'I stood before all others in dignity, but of actual power, I possessed no more than my colleagues in each several magistracy.' The office of princeps really abrogated the four republican principles we mentioned earlier divided control, short term of office, popular power and the dissociation within the city of Rome itself of the military from the civil power

From the time of Augustus, Rome was, therefore, an Empire This continued, with various vicissitudes, till about A.D. 476,

<sup>1</sup> E. Gibbon, *The History of the Decline and Fall of the Roman Empire*, Vol. I, ch. III

## §6] THE GOVERNMENT OF THE EMPIRE

which date may be said to mark the beginning of the medieval period

### §6 THE GOVERNMENT OF THE EMPIRE

By the time of Augustus, Rome had to manage a vast Empire including Macedonia and Achaëa, part of Africa, the Spains, Sicily, Sardinia and Corsica. To govern this Empire, the Romans invented no new system, they adapted their constitution to cover the administration of the provinces.

The subject communities of Rome were grouped as provinces. A province meant properly the 'department' or 'sphere of command' assigned to a Roman magistrate. It was in fact an aggregate of States or communities with diverse rank and status, constituted as a *provincia*. The *provincia* of Sicily, for instance, contained 68 such communities. Some of them, like Athens and Sparta, were technically free States, not subject to the control of the provincial governor, permitted to follow their own laws and free from liability to pay tribute. Their main obligations were to follow Rome in her foreign policy and to supply her with military contingents. Others were tributary States subject to the jurisdiction of the governor.

The governor was responsible for the administration of the province. His duties were to defend it from foreign attack, to watch over the conduct and policy of the people subject to his charge and to decide, or remit to Rome for decision, cases involving loss of life. From 146 B.C. down to the later years of the Republic, the Senate drew up a set of regulations for each new province, which the governor was expected to observe, a commission of ten was also sent to each province to co-operate with the governor in putting them into execution, and in arranging such details as seemed necessary. This body of regulations formed the *lex provinciae*, or the constitution of the province. Money, troops, and subordinate officials were provided by vote of the Senate. The general system of taxation was to collect a tenth of the produce of the land, those who had no land paid a poll-tax. There were, further, indirect taxes such as port dues. Direct taxes were collected by the local authorities and paid to the governor's financial assistant, the land-tax and indirect taxes were sold to tax farmers, who paid a fixed sum to the State for the right of collecting them.

The Roman provincial system had several defects. The most serious of these was the freedom of the governors from all effective control, notwithstanding the checks that were provided. The governor after resignation was liable to prosecution. 'But the courts were distant, the routes difficult, and the alien plaintiff must seek justice from the defendant's friends and accomplices.' The result of this was the practical irresponsibility of the governor, general extortion from the provincials, and maladministration. 'The Roman governor in his arrogant behaviour and general tyranny', says T. M. Taylor,<sup>1</sup> 'resembled rather a Persian satrap than a republican magistrate.' These defects were only aggravated by the existence of annual commands, the absence of an organized civil service and of some central authority at home not interested in provincial misrule, which might be expected to enforce responsibility on the governors. The governing class in Rome was rather interested in exploiting the provinces for their own profit. 'Even the population of the capital at home got their share of the spoil in the frequent distributions of corn and money.'<sup>2</sup>

Under the Empire, a conscious attempt was made to reform the system. The governors were kept at their posts for longer terms. They were paid regular salaries and forbidden plunder. An estimate was made of the resources of the Empire, and the burden of taxation was apportioned according to capacity. The system of farming the State dues was ended. The middleman gave place to the official and the official was taught to act as the servant of the State. Communications were improved, and served as an important unifying agency. An efficient civil service was developed.

## §7 RIGHTS AND DUTIES OF ROMAN CITIZENSHIP

The normal mode of acquisition of citizenship was of course birth by Roman parents. Exceptional modes were the conferment of citizenship by the State on foreigners and the manumission of slaves.

The rights of a citizen under the developed Republic are usually divided into two kinds—private and public. The private rights were *jus commercium* and *jus connubium*.<sup>3</sup> The first is

<sup>1</sup> *A Constitutional and Political History of Rome*, p. 202.

<sup>2</sup> H. F. Pelham, *Outlines of Roman History*, p. 170.

<sup>3</sup> Greenidge, *Roman Public Life*, pp. 35-6 and 136.

'the legal capacity to acquire full rights in every kind of property, to effect its acquisition, and to transfer it by the most binding forms, and to defend the acquired right in one's own person by Roman process of law' The second is 'the right to conclude a marriage which is regarded as fully valid by the State, and which, therefore, gives rise to the *patna potestas*' The public rights were those which enabled the citizens to have a share in government, viz the rights of voting in the assemblies, of standing as a candidate for the various elective offices of the State, such as those of consul and praetor, and of serving as a fully-equipped soldier in the legions

The Roman citizen, says Fowler,<sup>1</sup> was the most highly privileged person in the civilized world of that day The great prize of his citizenship was not so much the possession of public rights as 'the legal protection of his person and his property wherever he might be in the Empire'. No one could maltreat his person with impunity He could do business everywhere with the certainty that his sales, purchases, and contracts would be recognized and defended by Roman law, the non-citizen had no such guarantees for his transactions 'To live a life of security and prosperity you must be a Roman citizen'

The citizen also had certain duties which he owed to the State These were, obedience to law apart, twofold (i) Payment of tribute This was levied on all property, and was a fixed amount, viz one tenth per cent According to Taylor,<sup>2</sup> this is said to have been abolished by the patricians after the overthrow of the monarchy as a concession to the poor citizens, but was soon revived After the introduction of the principle of making the soldiers' pay a direct charge on the treasury, it was only levied in time of necessity, when other sources of revenue did not suffice, it was regarded as a loan and was repaid when the treasury was full When the revenues from the provinces had increased, the tribute was dropped It was not levied after 167 B.C.

(ii) Military service The normal duration of service was, in the Republican period, sixteen or at the most twenty yearly campaigns<sup>3</sup> for the foot-soldier, and ten campaigns for the knight

<sup>1</sup> *Rome*, pp 132-3

<sup>2</sup> Greenidge, *op cit*, p 138

<sup>3</sup> *op cit*, p 192

This duty incidentally implied another, the presence of the citizen at the census for registration

There was another class of citizen recognized by Roman Law, viz the partial citizen. He possessed the private but not the public rights; he was also subject to the duties of Roman citizenship. This status was conferred by Rome on the citizens of some towns which it conquered.

## §8 THE LEGACY OF ROME

The great service that Rome rendered to political development and the political education of the world was that it passed large masses of savage and semi-savage tribes through the yoke of political discipline and taught them the way of life of the State. 'Rome was', it has been well said by C. D. Buins, 'the political teacher and organizer of the peoples of three continents', and thereby Rome has bequeathed the ideal of law and order.

The Roman love of order and unity was so strong that the men of the Middle Ages were obsessed by the notion of the political unity of the world in the face of the most disintegrating forces. This idea took definite shape in the conception of the Holy Roman Empire. And, according to C. F. Strong,<sup>1</sup> this Roman love of unity is the basis of the persistent dream among moderns of the ultimate establishment of some international or super-national authority for the prevention of war.

In the field of political organization, the contributions of Rome have mainly been the mixed constitution and the principle of checks and balances embodied in that constitution and expounded by her famous historian, Polybius. In the Roman constitution, as we have seen, the consuls represented the monarchic element, the Senate was aristocratic and the assemblies were democratic. Each one of these exercised some check on the others, no one being able to act effectively without the consent of all. Thus an elaborate system of checks and balances was created. Polybius was among the first writers to perceive the advantages of a mixed constitution and of checks and balances in the organization of government.

Above all, the distinctive gift of Rome to civilization has been her system of law, which is now the basis of the legal systems of many European countries. The foundations of Roman law, as

<sup>1</sup> *Modern Political Constitutions*, p. 22

we have seen, may be traced to the Republic, it was, however, under the Empire that it developed into a logical system. This apart, the distinctive contributions of Rome in the sphere of law have been twofold. First, in the words of MacIver,<sup>1</sup> it was Rome that liberated the universality of law, and 'first embodied in one comprehensive and unified code the distinctive order of the State'. Before Rome, 'the protection of the law had been a political privilege, fully available only to the citizen body. The stranger required a citizen-patron before he could enjoy the guarantee of law. The idea that law has a common application to all persons within a political territory had been alien to the Greeks and was worked out by Rome. This she did by developing what is known as *jus gentium*, i.e. 'the law which all men everywhere obey', evolved by the Roman praetors out of principles presumed to be the common basis of justice for aliens and Romans alike. Secondly, the Roman conception of the law of nature<sup>2</sup> has been of great value. According to Cicero, the law of nature is but

'right reason, which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties, by its prohibitions it restrains them from doing wrong'.

The value of this conception in later days has been great. It has helped to keep before the mental vision a type of perfect law to which human law is expected to approximate, to sweep away ideas and institutions which have become obsolete, e.g. slavery; to advance the cause of freedom against arbitrary rule, to develop the doctrine of equality, as all men were declared by nature to be equal, and to inspire jurists in the seventeenth century (e.g. Grotius) to lay the foundations of international law.

## §9 DECAY OF THE CITY-STATE

The history of ancient city-States shows that their decay was brought about by three causes: internal quarrels, inability to withstand attack by powerful country-States, and expansion. It is interesting to reflect that all these are related in some way to the small size of the State, as will be seen in the sequel.

The internal dissensions within the Greek city-States became

<sup>1</sup> *The Modern State*, pp. 103-5.

<sup>2</sup> The Romans did not invent it, it can be traced to the Greeks.



marked in the fifth century B C In the oligarchic cities, the richer and ruling class oppressed the Demos, and got rid of the most dangerous of its leaders; in the democratic States, the Demos exiled the few rich. This second point is illustrated by the events which took place in Naxos The Demos of Naxos sent a number of its oligarchic party into exile in 501 B C, the exiles went to Miletus and asked help of its ruler, Aristagoras He asked for aid from the Persian satrap<sup>1</sup> This is a story which is constantly repeated in various forms during the fifth and fourth centuries B C 'Greeks, quarrelling among themselves, allow the common enemy to be called in' The primary reasons for these internal feuds<sup>2</sup> were inequality and jealousy

'The cause of all these evils', writes Thucydides,<sup>3</sup> 'was the love of power, originating in avarice and ambition, and the party-spirit which is engendered by them when men are fairly embarked in a contest For the leaders on either side used specious names, the one party professing to uphold the constitutional equality of the many, the other the wisdom of an aristocracy, while they made the public interests, to which in name only they were devoted, in reality their prize Striving in every way to overcome each other, they committed the most monstrous crimes, yet even these were surpassed by the magnitude of their revenges, which they pursued to the very uttermost, neither party observing any definite limits either of justice or public expediency, but both alike making the caprice of the moment their law'

Aristotle is inclined to emphasize the desire for equality as the root cause 'Upon the whole', says he,<sup>4</sup> 'those who aim after an equality are the cause of seditions' The effect of inequality was aggravated by the small size of the State, because the comfort of the few, as contrasted with the suffering of the many, was more manifest when 'the rich man daily met the poor man and scorned him, the poor man daily saw the rich man and hated him'

The inability to withstand attack by powerful country-States is directly related to the size of the city-State, and is best illustrated from Greece The Macedonians were a people devoted to military pursuits, inhabiting a large territory to the north of Greece, and united under a strong military genius To resist such

<sup>1</sup> Fowler, *The City-State of the Greeks and Romans*, pp 248-9

<sup>2</sup> Technically called *stasis*

<sup>3</sup> *Works* (trans B Jowett), Vol I, pp 243-4.

<sup>4</sup> *Politics* (Everyman's Library edition), p 143

a people as the Macedonians, says Hammond, the Greeks would have to do the impossible

‘to unlearn in a moment all the maxims of jealous precaution against rival cities by which they had regulated their conduct, to give up the practice of politics in miniature and understand at once what was needed in politics on a larger scale’

As it was, their jealousy prevented united resistance and, after the battle of Chaeronea in 338 B C, Greece lay at the mercy of Philip, King of Macedonia

The last cause is the expansion of the city-State, such as took place when Rome became an Empire. Not only did she deprive many cities of their independence and, therefore, of their statehood, but she herself lost the compactness so essential to a city-State

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## MEDIEVAL EUROPEAN POLITY

## §1 FEUDALISM · ITS MEANING

The most outstanding feature of medieval Europe, from A.D. 476-1500, was feudalism, the name given to the form of society and government which then prevailed, and which attained its most perfect development in the eleventh, twelfth and thirteenth centuries. Its essential characteristics were . (i) the holding of land by a vassal from a lord , (ii) the existence of a close personal bond between the lord and the vassal , and (iii) the full or partial rights of sovereignty which the holder of an estate had over those living on it. An estate of this nature, whether big or small, was called a fief or feud , hence the term feudalism.

According to feudal theory, the kings of the earth were vassals of the emperor,<sup>1</sup> who was God's vassal. They received their dominions as fiefs to be held on conditions of loyalty to their lord. Each king, in turn, parcelled out his kingdom into a certain number of large divisions, each of which he granted to a single man, who promised in general to be faithful to him and to serve him. So long as he fulfilled his duties, he continued to hold the lands, and his heirs after him, on the same terms. In the same way, the tenants-in-chief of the king divided their land among vassals on like conditions , these vassals, among others, and so on down through any number of stages.

The king, on receiving his fief, was entrusted with sovereignty over all persons living upon it , he became their law-maker, their commander, and their judge.

' Then, when he parcelled out his fief among his great men, he invested them, within the limits of the fiefs granted, with all his own sovereign rights. Each vassal became a virtual sovereign in his own domain. And when these great vassals subdivided their fiefs and granted parcels to others, they in turn invested their vassals with more or less of those powers of sovereignty with which they themselves had been clothed.'<sup>2</sup>

<sup>1</sup> See §4 below.

- P. V. N. Myers, *Medieval and Modern History*, p. 76. Myers notes that the holders of small fiefs were not allowed to exercise the more important functions of sovereignty. Thus though in France in the tenth century

## §2 ] POLITICAL CONCEPTIONS OF FEUDALISM

The key to the understanding of feudal society is thus to be found in the relation of the vassal to his lord. The vassal owed his lord fidelity, this was promised by him at the ceremony of homage.

'The vassal came before his lord, bareheaded and unarmed, and declared on his knees that he became his "man". The lord then kissed him and raised him from his knees. Then the vassal swore fidelity (fealty) to his lord.'

Among other obligations of the vassal to his lord were military service, normally limited to forty days a year, rent for his land and house, work at the lord's fields for a certain number of days in the year, aids on such occasions as the knighting of the lord's eldest son, the marriage of his daughter, the ransoming of his person if he were made a prisoner of war, relief or the payment made when a new heir succeeded to the fief, fines upon alienation paid when the land was alienated by the vassal to another, lodging and hospitality to the lord and his followers on his journeys or hunting expeditions, and attendance at the lord's court. If a vassal died without heirs his property reverted to the lord. If he were guilty of treason, the lord might claim his possession by forfeiture.

The one great duty of the lord to his vassal was to protect him. to avenge his vassal's wrongs, to defend his rights and to secure him justice in all matters. This was very important at a time when there was general insecurity.

## §2 THE POLITICAL CONCEPTIONS OF FEUDALISM

The most important assumption underlying feudalism was that the individual's relation to land tended to determine his political rights and duties.

'The public duties and obligations which ordinarily the citizen owes to the State', says Adams,<sup>1</sup> 'are turned into private and personal services which he owes to his lord in return for land which he has received from him. The State no longer depends upon its citizens, as citizens, for the fulfilment of public duties, but it depends upon a certain few to perform specified duties, which they owe as vassals of the king, and these in turn depend upon their vassals for services, which will enable them to meet their own obligations towards the king.'

there were about 70,000 fief holders, only between 100 and 200 had the right to coin money, levy taxes, make laws, and administer their own justice.

<sup>1</sup> G. B. Adams, *Civilization during the Middle Ages*, p. 195.

The landless man, in fact, had no privileges as a citizen ; he had to find a lord if he wanted protection and a place in the social system. He therefore entered the service of some large land-owner, in some capacity or other, and obtained protection; in return he fulfilled certain specific obligations. This brought about 'the substitution of personal loyalty to a superior for the tie of common citizenship'.

In this basic conception is implied another - the fusion of governmental rights with land tenure, i.e. the landlord had some important governmental rights over the freemen residing on his land. He could decide property titles, make military levies, coin money, levy taxes and hold his own independent courts of justice. Indeed from this point of view feudalism may rightly be defined as 'the identification of landed property with sovereignty'. Sovereignty, indeed, of this petty parcelled kind had become a private hereditary possession, an item in the family assets.

Thirdly, the State was disintegrated. It no longer acted as a whole, but in semi-independent parts. The central authority did not act directly upon all individuals alike throughout a common territory. Feudalism was, indeed, the negation of central government and administration. The king controlled directly only his immediate vassals, other men, lower down in the series, could be reached from above only through *their* immediate lords. Authority filtered down to the lower grades of society through the higher. Feudalism was a system 'not of general obedience to common law, but of personal obedience and subordination founded upon landownership'. A community in which important governmental powers were held by large landowners, and in which the central government was weak, was very imperfectly orderly in practice.

### §3 MERITS AND DEFECTS

With all its imperfections, feudalism has rendered inestimable service to the European polity. The political unity and the way of life of the State, built up laboriously by Rome in western Europe, were threatened with complete destruction in consequence of the barbarian invasions which caused the downfall of her Empire. At such a time, by welding together the strong sentiment of personal loyalty and the stable attachments connected with the possession of land, feudalism gave some order

and avoided total chaos, it provided 'a temporary scaffolding or framework of order on which a truer national life could grow'.

Secondly, it fostered among the big landlords self-reliance and love of personal independence

'Turbulent, violent, and ungovernable as was the feudal aristocracy of Europe,' says Myers,<sup>1</sup> 'it performed the grand service of keeping alive during the later medieval period the spirit of liberty. The feudal lords would not allow themselves to be dealt with arrogantly by their king, they stood on their rights as freemen'

'By God, Sir Constable', says Edward I of England, 'thou shalt fight in France with me or hang' 'By God, Sir King', is the reply, 'I will neither fight nor hang' The barons in England prevented kings from becoming too despotic and tyrannical, as may be seen from the history of King John's reign, at a time when the yeoman and the burgher had not become bold enough to resist the monarch, this was a real service to the cause of freedom

The defect, however, of the feudal system was, as may be seen from the foregoing discussion, 'the confusion of public and private rights', which was yet essential to it. It also rendered difficult the formation of strong national Governments, as a country was split up into a vast number of practically independent principalities. Briefly, it was liable to the disease of anarchy, indeed where the private ownership of land by a feudal chief was the basis of social order, anarchy was, we may say, inevitable. Adams' remark that 'the feudal system was confusion roughly organized' sums up its true place in the evolution of European polity

#### §4 TWO UNIFYING FORCES

##### *The Church*

The separatist and disintegrating tendencies of feudalism were in striking contrast to the magnificent medieval ideal of the *Respublica Christiana*, in which churchmanship was co-extensive with citizenship—a universal Christian society, living under one principle of life, and divinely ordained to be governed by two authorities, the spiritual and the temporal (the Catholic Church and the Holy Roman Empire) in accordance with divine and natural law. On account of the weakness of this ideal in its application to the actual problems of government (i.e. on

<sup>1</sup> op cit, pp 86-7

account of the absence of the means for deciding what functions pertained to the religious and what to the secular aim), quarrels took place between the Church and the Empire. We are not concerned here with their quarrels, but rather with their services as unifying influences.

The Church had internal unity. Its officials were definitely connected by the use of one language and in general agreement as to the nature of the world and the duties of man. Their customs and traditions, even apart from religious ritual, were the same. The Church recognized no boundaries, whether of baronies or of States as limits to its own spiritual sovereignty. Its lesson was brotherhood, and that lesson, though often neglected, was never completely lost sight of or forgotten. Its influence was exerted on the side of the one who proved himself capable of creating larger wholes of political authority. Its laws were not diverse, but always the same and reached the people through the administration of ecclesiastical courts. The Church, says Ernest Barker,<sup>1</sup> enthroning itself over Christian society, makes a great and gallant attempt to unify all life, in all its reaches, political, social, economic and intellectual. Politically, it attempts to rebuke and correct kings for internal misgovernment, as when they falsify coinage, and for external misdoing, as when they break treaties. Socially, it controls the life of the family by the law of marriage, which it administers, and the life of the individual, by its system of penance. Economically, it seeks to regulate commerce and industry by enforcing just prices and prohibiting usury, as it seeks to control the economic motive in general by its conception of property as a trust held for the general benefit and by its inculcation of charity. Intellectually, it develops a single culture in the universities which are its organs, and in the last resort it enforces that culture by the persecution of heresy and by excommunication, for 'if you were excommunicated by the authorities of the Church you lost all legal and political rights'. Truly may it be said that the Church was the State in the Middle Ages.

### *The Holy Roman Empire*

Like the unity of the Church, the idea of one universal temporal State was preserved through the institution known as the

<sup>1</sup> E. Barker, in F. J. C. Hearnshaw (ed.), *The Social and Political Ideas of some Great Mediaeval Thinkers*, p. 15.

Holy Roman Empire The Empire came into existence when Charles the Great, King of the Franks (A.D. 768-814), succeeded in bringing together under his sword the territory now included in Germany, Switzerland, Hungary, most of Italy, France and Belgium. It was on Christmas Day 800 that he was crowned by the Pope as emperor of Rome. With various vicissitudes, the Empire continued to exist till 1806 when Francis II resigned the imperial dignity. For the larger part of its history, it was an Empire only in name, in effect it was not more than the sovereignty of Germany and Italy vested in a Germanic prince, but it at least kept alive the ideal of the unity of Christendom.

Essentially, as Bryce has pointed out in a classic analysis,<sup>1</sup> the Holy Roman Church and the Holy Roman Empire were one and the same thing, the universal Christian society in two aspects: as divine and eternal it had for its head the Pope, to whom souls had been entrusted; as human and temporal, the emperor, commissioned to rule men's bodies and acts. To the position of the emperor, we are told, three duties were attached. He who held it must typify spiritual unity, must preserve peace and must be a fountain of all law and justice, by which alone among imperfect men peace is preserved and restored. Placed in the midst of Europe, the emperor was to bind its people into one body, reminding them of their common faith, their common blood and their common interest in each other's welfare. He settled disputes between warring States, and represented the common interest of Christendom in such matters of moment as the crusades. To him the princes of Europe were bound to render obedience, he could punish offenders against the public order of Christendom.

'And that he might be the peace-maker, he must be the expounder of justice, and the author of its concrete embodiment, the positive law, chief legislator and supreme judge of appeal, the one and only source of all legitimate authority.'

The Holy Roman Empire has been described by Frantz as the keystone of the arch of the whole temporal order of the Middle Ages, yet 'it was not a coercive authority that the German emperor, the head of the Holy Roman Empire, exercised over the rest of Europe, it was rather a moral authority.' It was characteristic, too, of the men of the Middle Ages that, demand-

<sup>1</sup> *The Holy Roman Empire*, ch. VII



ing the existence of an emperor, they cared little who he was or how he was chosen, so long as he had been duly inaugurated. And they were not shocked by the contrast between unbounded rights and actual helplessness, for at no time in the world's history has theory, professing all the while to control practice, been so utterly divorced from it.<sup>1</sup>

## §5 MEDIEVAL CITY-STATES

From the eleventh century to the fourteenth, there was, throughout Europe, a marked rise of towns to prominence. The growth of trade and industry had made them wealthy, they now demanded self-government. Towns developed in England, France, the Netherlands, Germany, and Italy, they acquired most power in Germany and Italy, where the central government was weakest. In Italy, indeed, they were virtually independent little city-States of the ancient Greek type.

Everywhere the principal cause of the growth of towns was the facility they offered to industry and commerce and, consequently, to the increase of wealth. Being walled towns, fortified and organized for defence, they also provided greater security than the neighbouring country—an important consideration in those days of general insecurity. The urban populations were interested in developing their trade and industry. They found, however, that they could not succeed in their endeavour unless they first got rid of their vexatious obligations to the feudal lord in whose domain they were situated: their liability to satisfy uncertain and inconvenient demands for money, to submit themselves to multiple jurisdictions and to the inconveniences arising from the unfree status of many of the artisans who had originally been slaves. They began to demand conditions under which, as Fisher put it bluntly, money could safely be made. In broad outline, they claimed

'to be permitted to compound for their own farm or taxes, to be permitted to make their own by-laws, to be relieved of onerous feudal servitudes, to have their civil suits tried in their own courts and within their own walls, to be able to select their own officers, and that serfs resident for a year and a day within a town or borough should be regarded as free.'<sup>2</sup>

<sup>1</sup> Bryce, *op cit*

<sup>2</sup> H. Puenne, *Medieval Cities*, pp. 176-7

What they wanted, in fine, was a more or less extensive degree of political autonomy and local self-government

The movement for emancipation is everywhere marked by the demand for a charter from the suzerain—be he baron, prelate, prince or emperor—embodying the liberties claimed. In some cases, this was obtained by a monetary transaction, as at London, elsewhere through a revolutionary process, as at Laon and Beauvais in northern France and Milan in Italy, and in others, by 'a peaceful process of permitted growth', as at Tournai and St Omer in Flanders

From the charters that have come down to us, it is clear that the freedom conferred on towns varied enormously. There is no need for our purpose to take account of the differences in detail. Broadly speaking, two kinds of chartered town are found.<sup>1</sup> The first and larger class includes communities enjoying certain privileges under the rule of seignorial functionaries. A smaller class consists of those which are not only privileged but 'free'; that is, self-governing bodies corporate. Often the one class shades off into the other.

The burgesses of the first type of city (e.g. St Riquier and Breteuil) are found to enjoy the following privileges: a free status, the freedom of the land with the right freely to transfer it, convey it, mortgage it, and make it serve as security for capital, the town-peace 'protected by special pains and penalties', the right of trade, commutation for a fixed money-rent of their servile dues and obligations, such as that of furnishing the feudal seigneur with lodging and subsistence during his tours, taking up arms at his summons, using the common ovens, mills, etc., the right to collect market-tolls, commercial jurisdiction, a monopoly of certain staple industries in the town and neighbourhood and rights of pre-emption over all imported wares.

It is to the second type of medieval city that the term 'city-State' is more appropriate, for, in addition to the privileges mentioned above, they enjoyed self-government. The charter secured by the city of St Omer in 1127, for instance, recognized<sup>2</sup> the city as a distinct legal territory, provided with a special law common to all inhabitants with special aldermanic courts and a full communal autonomy. Its inhabitants were given the right

<sup>1</sup> H. W. C. Davis, *Mediaeval Europe*, p. 218.

<sup>2</sup> Pirenne, *op. cit.*, pp. 197-8.

to be tried by magistrates recruited, and often elected, from their midst. In Italy, in the south of France, and in parts of Germany, these magistrates were called 'consuls', in the Netherlands and in northern France, *échevins* or aldermen; and elsewhere, *juries* or jurors. Cities of this class were administered by councils, each with a president at the head, known in France and England as the mayor and in Germany as the burgomaster, who represented the city in negotiations with the lord, the king or with other cities. In some of the cities, a mass-meeting was held to elect the magistrates and councils, to vote taxes, audit accounts and decide on all questions of importance. The self-governing city may best be described, as 'a commercial and industrial commune living in the shelter of a fortified *enceinte* and enjoying a law, an administration and a jurisprudence of exception which made of it a collective, privileged personality'<sup>1</sup>

In the general evolution of cities, only one other important feature remains to be noticed. It was generally a guild of merchants that led the agitation to secure the liberties of cities, and, indeed, in the initial stages, monopolized the government of the city, 'craftsmen' being excluded from the class of 'freemen' of the town. In time, the craftsmen—the weavers, the spinners, the bakers and the rest—formed guilds of their own on the model of merchant guilds. In some cities there were upwards of fifty of these associations<sup>2</sup>

'No sooner had these plebeian societies grown strong', says Myers,<sup>3</sup> 'than, in many of the continental [i.e. European] cities, they entered into a bitter struggle with the patrician guild merchant for a share in the municipal government or for participation in its trade monopoly. It lasted for two centuries and more and during all this time filled the towns with strenuous confusion. The outcome, speaking in general terms was the triumph of the craftsmen.'

Finally, a tendency towards a new kind of oligarchy within the crafts began to develop,<sup>4</sup> the master-artisans being privileged as against the 'journeymen', and the wealthier among the master-artisans themselves acquiring a leading position as contrasted with the poorer among them.

The lines of evolution of medieval cities may be summarized

<sup>1</sup> *ibid*, p. 220

<sup>2</sup> Myers, *op cit*, p. 154

<sup>3</sup> *ibid*

<sup>4</sup> Sidgwick, *The Development of European Polity*, pp. 239-41

thus the city works itself free from the political system of the surrounding country, the merchants take the lead, then the crafts rise to equality, finally, an oligarchy of master-artisans, and of the richer among them, develops within the crafts

## §6 IN ITALY

We have said earlier that it was in Italy that the mediæval cities acquired the greatest power and influence. Towards the close of the thirteenth century there were about two hundred of them<sup>1</sup> in northern and central Italy—self-governing little city-Republics, with just a nominal dependence upon Pope or emperor. Doubtless, their power is explained by two causes—their rich trade with the East and the absence, especially in contrast to the position in England and France, of an effective central power in Italy.

By the eleventh century, many of the cities had been granted, de Sismondi tells us,<sup>2</sup> not only the right of raising fortifications, but also that of assembling the citizens to concert together the means of their common defence. This meeting of all the men of the city-State capable of bearing arms was called a Parliament. It elected annually two consuls charged with the administration of justice at home and the command of the army abroad. It also appointed a secret council, called the *Consiglio di Credenza*, to assist the Government, besides a grand council of the people, who prepared the decisions to be submitted to the Parliament. The *Consiglio di Credenza* was at the same time charged with the administration of the finances, consisting chiefly of entrance duties collected at the gates of the city and voluntary contributions asked of the citizens in moments of danger.

The cities had acquired their freedom and a republican constitution, but, as O. J. Thatcher remarks, this did not ensure law and order.

‘They were engaged in constant feuds with each other. Only members of the ruling guilds had a share in the Government, and the class distinctions among the inhabitants formed a large disturbing element. The higher and the lower nobility and the rich merchants struggled for authority and disregarded the rights of the industrial classes.’<sup>3</sup>

<sup>1</sup> Myers, *op cit*, p. 157

<sup>2</sup> *A History of the Italian Republics*, pp. 201

<sup>3</sup> Thatcher, *A Short History of Mediæval Europe*, pp. 223-4

There were not only internal feuds, it often happened that the conflicting interests of cities led to fierce struggles between them, ending only with the ruin of one of the rivals, as in the contest between Florence and Pisa or between Venice and Genoa. The issue was further complicated by the fact that some cities called in the aid of the emperor (and were called Ghibelline) while others joined with the Pope (and were called Guelph). The constant wars and the strife of parties had their inevitable result, the gradual decline of democratic institutions. The first step in this process was the adoption, by many cities in the latter half of the twelfth century and in the thirteenth, of an institution known as the Podesta, 'a stranger knight, chosen from some other city, and invested with the highest executive power'.<sup>1</sup> His primary function was to repress anarchy within the city, he also had to direct military expeditions. The armed force of the city was placed at his disposal for both objects. The Podesta, it must be noticed, was an addition to the normal democratic institutions of the cities. Milan appointed its first annual Podesta in 1186, Genoa, in 1190. The second stage in the decline of the republican institutions of the cities is the rise of the tyrants, 'many of whom by their crimes rendered themselves as odious as the worst of the tyrants who usurped supreme power in the cities of ancient Hellas'. The Podesta was apparently inadequate to meet the dangers from within and from without, so despots came to power. Azzo VI at Ferrara (1209), Romano at Verona (1225) and Sforza at Milan (1450). Sidgwick notes the interesting fact that 'though the Tyrannus often is established by violence, he mostly goes through the form of election',<sup>2</sup> a make-believe adopted by dictators in modern times as well.

### *Comparison with Greek city-States*<sup>3</sup>

This survey of medieval Italian city-States shows that in some respects their origin and development were not unlike those of the ancient Greek city-States. Both owed their origin to their military advantage and the facilities for trade and industry they offered, both showed a concentrated political life and patriotism.

<sup>1</sup> Sidgwick, *op cit*, p. 273, this reference also gives the rules which regulated the office.

<sup>2</sup> *op cit*, p. 275.

<sup>3</sup> *ibid*. See lecture XIX for an elaboration of the points discussed in the two following paragraphs.

especially in the early years of their history, in both, in the later years of their history, we find stasis. In their constitutional development, we note some striking similarities. In both, in the initial stages, the administration is in the hands of the few, while some important decisions are brought before an assembly of people (the 'Agora' in Greece and the 'Parlamento' in Italy); dissensions arise and there is a drift to democracy, and, later still, in times of disorder, there is the rule of the despot. Finally in both cases, as Sidgwick shows,<sup>1</sup> civilization, with the habits of peaceful industry and the luxury thereby obtained, makes the citizens in course of time personally disinclined for war, which they carry on more and more by means of mercenaries. This, together with their incapacity to form a stable union, leads to their ultimate defeat, when they are brought face to face with the larger country-States in their neighbourhood.

There are, however, important differences. In ancient city-States, mechanical labour was servile, in medieval times it was free. In the former, the internal quarrels were between the rich and the poor, in the latter, first, between the feudal nobility and the merchants, and, later, between the merchants and the artisans. Again, Italian democracy was more partial than the Greek, for it never effectively included all the *free* native inhabitants of the town, but only a certain number of organized trades and crafts, it was also more imperfectly developed, as the Italian *Demos* never attempted actually to govern like the Greek.<sup>2</sup> And, finally, the Greek tyrant almost always began and ended as an unconstitutional ruler, in the Italian cities, the rule of the despot was to a much greater extent regularized by formal election and regarded as legitimate by general sentiment.<sup>3</sup>

## §7 MEDIEVAL PARLIAMENTS

Before we pass on to the modern period, we must consider a significant political invention of the Middle Ages, viz representative parliaments. It was apparently in the twelfth century, according to Jenks, that the rulers of western Europe began dealing with the deputies of their subject-communities on the matter of taxation, no longer by individual or local action but as a whole, by summons to a central Assembly or Parliament. Clearly, these parliaments owed their origin to the pecuniary needs of kings.

<sup>1</sup> *ibid*

<sup>2</sup> *ibid*

<sup>3</sup> Sidgwick, *op cit*

who found them convenient instruments with which to satisfy their needs, later, however, they began to criticize and control kings, and demanded and secured important powers in the government of the State

Illustrations of medieval parliaments may be given from England, Spain, France, and Sweden. In 1295 Edward I of England summoned to the 'Model Parliament' the lay and spiritual peers, the representatives of the lower clergy, two knights from each shire, and a varying number of members, generally two, from each town and borough. The composition of the assembly is noteworthy because in the England of those days there were only three important occupations—that of the agriculturist, of the trader, and of the priest. They were all represented in the Model Parliament: the landed interest by the lay peers and the knights of the shire, trade and industry by the borough members, and the Church by the spiritual peers and the representatives of the lower clergy. In Aragon (one of the medieval Spanish kingdoms) the Cortes (Parliament) was composed of four estates: the higher nobility, the knights, the clergy, and the towns and universities. To the States-General summoned by Philip IV of France in 1302 were summoned all tenants-in-chief, as well as representatives of cathedral chapters, monasteries, and of the burghers or inhabitants of towns. In fact the only class unrepresented was the peasantry, and it was probably presumed that the landowners spoke for the whole agricultural interests. In Sweden, until less than a century ago, the Riksdag was divided into four estates: nobles, priests, burghesses, and peasants, each of which sat and deliberated apart from the rest.

Medieval parliaments were parliaments of 'estates', i.e. representative of special classes or interests such as the nobility, the clergy, etc., rather than representative of the people as a whole. They reflected in their composition all but one (i.e. the last) of the classes of medieval society, the noble, the knight, the priest, the burghess and the serf. For a long time the deputies of each estate were separately summoned, and, indeed, often sat in different chambers and voted separately (in Sweden till 1866). Thus it came about that in the place of single or double-chambered assemblies, such as we are familiar with, there were sometimes three and four chambers. Further, as Jenks says, the

State required not merely representatives of individuals acting haphazard, but representatives of *communities*, which could be held bound by the promises of their spokesmen—the shire, the borough, the diocese, the cathedral chapter. These bodies, though not corporations in the technical sense, were all *communities*, having property which could be seized or at least members who could be held responsible. Strangely enough, liability, not privilege, was the basis of parliamentary representation.<sup>1</sup> It is noteworthy, too, that the medieval representative was a delegate, i.e. one whose duty was to declare the will of those whom he represented, he had no right to use his independent judgement.

The modern Parliament is generally bicameral, it is also *national* in character. Parliament, Burke has said, is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where not local purposes, not local prejudices, ought to guide but the general good resulting from the general reason of the whole. It is generally elected from mixed territorial constituencies, consisting of men who follow different occupations, the representative, too, is not bound by the mandate of his constituency. His duty is to consult with the representatives of other parts of the country and to devise the measures best adapted for securing the interests of the whole community, he is not, unlike his medieval counterpart, 'an agent commissioned to watch over the separate, independent, and possibly conflicting interests of his principal.'

There is also some difference in the nature of the functions performed by parliaments then and now. The medieval Parliament was scarcely a Legislature in our sense of the word, for legislation of a permanent and general kind was an occasional expedient. Its chief function, after the voting of supplies, was to criticize and complain. Today, Parliament has become enormously more important, it not only passes general laws but in some States controls the Executive. A seat in it is, therefore, eagerly sought after, with the result that elections are contested. It is interesting to reflect that not only were elections not contested in medieval times, but sometimes the royal officials in their eagerness to secure some representative had to lay hold on those whom they considered to be suitable persons and pack them off to Parliament!<sup>2</sup>

<sup>1</sup> Jenks, *A History of Politics*, p. 128

<sup>2</sup> *ibid*, p. 130



§8 THE CONTRIBUTIONS OF THE MIDDLE AGES

The Middle Ages, says Barker,<sup>1</sup> are not dead. They live among us, and are contemporary with us, in many institutions of our life and many modes of our thought

First in importance among the legacies from the period is the conception that the purpose of the political organization is ethical, i.e. to maintain justice and righteousness. This is reiterated again and again by the writers of the Middle Ages.<sup>2</sup> The ruler is God's minister for the punishment of the wicked and the reward of the good. This may appear to some as too obvious to require statement and to others as too indefinite to be of much profit. Nevertheless, the ideal is worth emphasis, for, 'it is exactly the pursuit of justice which distinguishes a rational and moral society from a stupid anarchy'

Closely related to this is a second legacy—the principle of the supremacy of law as the concrete embodiment of justice. Positive law was to embody in itself those ultimate principles of justice by which the men of the Middle Ages believed the whole universe was ordered. The law, so conceived, was supreme over every member of the community including the king. Bracton said that the king was under God and the law.

A third valuable idea which is expressed emphatically in the political literature of the time is that of the reciprocal obligations of the ruler and the ruled—the king was to maintain justice and the subjects to observe the law. This was indeed the meaning of the mutual oaths at the ceremony of coronation. It followed that a ruler who had broken his contract could be deposed, John of Salisbury in the twelfth century even speaks of the lawfulness of slaying the tyrant. The conclusion was also deduced that, subject to the final authority of justice and the divine and natural laws, it was the community which was supreme—the community which included the king, the nobles and the people. This was the principle out of which the representative system grew. The development of representative institutions is, clearly, one of the most significant contributions of the Middle Ages to modern times.

A fourth idea is the clear recognition by men that there are

<sup>1</sup> *op. cit.*, p. 11

<sup>2</sup> R. W. and A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, Vol. III, p. 181

## §9] TRANSITION TO MODERN HISTORY

aspects of the moral and spiritual life which the coercive machinery of the State cannot adequately represent. This is indeed the principle which lay behind the development of the conception of the independence of the Church. That this principle was not known in ancient times has been indicated earlier, its significance in enabling the individual to develop a free personality hardly needs elaboration.

In many other ways, the Middle Ages have influenced modern politics; it is sufficient to mention here how the influence of the conception of the Holy Roman Empire has helped in the establishment of some international body as the arbitrator in disputes between States, and how the influence of the guilds and municipal institutions has inspired the pluralistic doctrines of our time.

## §9 TRANSITION TO MODERN HISTORY

The close of the fifteenth century may be said to mark the transition from medieval to modern history. By this time, strong, centralized national governments had been established in England, France, and Spain. *Pari passu* feudalism as a governmental system had declined, the cities had lost their freedom, and the power of the kings had grown. The medieval conception of a universal Empire supported by a universal Church gradually broke down under the stress of circumstances. Two of these—the Renaissance and the maritime discoveries—are relevant to the context and may be briefly noticed here.

The Renaissance was a revival of learning in Europe, a new intellectual and artistic movement. It brought with it a secular, inquiring, critical, and self-reliant spirit. It also resulted in the revival of the study of Political Science and of Roman law. The general political effect was to increase the authority of kings, for it was a fundamental doctrine of the Roman jurists (whose books were read in the medieval period) that *all* governmental power, the *imperium*, was vested in the ruler. Inductively, the Renaissance also helped the disappearance of the medieval conception of society embodied in the Holy Roman Empire.

‘It was not that the Renaissance exerted any direct political influence either against the Empire or for it. Men were too busy upon statues and coins and manuscripts to care what befell popes or emperors. It acted rather by silently withdrawing the whole system of doctrines upon which the Empire had rested, and thus

leaving it, since it had previously no support but that of opinion, without any support at all'<sup>1</sup>

The maritime discoveries<sup>2</sup> of the age contributed to the same result in a different way. The discovery of America, combined with the acquisition of greater knowledge concerning India and the Far East, forced even the most-reluctant to realize that the world was a good deal larger than had previously been believed possible. And when in addition there appeared Copernicus with proof that there was not one universe but many, the question was asked. How could the rule of mankind have been entrusted by Divine Providence to pope and emperor when there were not only other continents in this world, but whole universes in space, which had never heard of either of them?<sup>3</sup> The maritime discoveries, besides, strengthened the power of the monarch, for men were eager for peace and order, which a strong king alone could give, so that they might take advantage of the opportunities for material wealth now offered by colonization and the rise of colonial empires. The external development of the area over which the national monarch ruled also reacted on the degree of authority which he exercised within his dominions. 'Every extension of his sway intensified his dignity and power and lifted him far higher above his subjects' (Pollard)

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<sup>1</sup> Bryce, op. cit., pp. 360-1

<sup>2</sup> 1492 Columbus discovered America

1497 Vasco da Gama opened the Cape route to the East

1497 Cabot discovered Newfoundland

1500 Cabral discovered Brazil

1519-22 Magellan sailed round the world

<sup>3</sup> C. Petrie, *The History of Government*, p. 69

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## CHAPTER XV

# THE MODERN PERIOD

### §1 THE RISE OF ABSOLUTE MONARCHY

Generally speaking, the three centuries in the history of Europe which followed the discovery of America are an era of absolute hereditary monarchy, there being no established constitutional authority which could effectively check the kings or call them to account. The Tudor kings of England (1485-1603), Louis XIV of France (1643-1715), Frederick the Great of Prussia (1740-86), Catherine the Great of Russia (1762-96) and Joseph II of Austria (1780-90) are the leading examples of the despots of the period.

It is sufficient in this context to indicate the main causes of this development. Two of these have already been mentioned, viz the revival of the study of Roman law during the period of the Renaissance and the maritime discoveries. A third is the discovery of gunpowder in the fourteenth century. 'It hastened the downfall of feudalism by rendering the yeoman foot-soldier equal to the armour-clad knight.' It made all men of the same height, as Carlyle put it. It also became the practice now for rulers to keep a standing army of mercenaries which was both more serviceable and reliable than the feudal levy supplied by the proud barons for short periods. The development of cities and the formation of a citizen class also promoted royal power by placing within its reach materials for a permanent military force and the means of sustaining it. Such an army carefully drilled, paid, always available and directly under his command, gave the king a new and superior force which the barons could not resist.

A fourth cause is the Reformation. From the religious point of view, the outcome of the Reformation in the sixteenth century was, very broadly stated, the separation of North Germany, Denmark, Norway, Sweden, England and parts of Switzerland and of the Netherlands from the Roman Catholic Church. France, Spain, Italy, South Germany, Poland, Bohemia, Hungary and Ireland for the most part adhered to the ancient Church. Politi-

cally, it brought about, in the first half of the sixteenth century, *the development of absolute monarchy in a territorial State*. The medieval world, as we have seen, conceived of Christendom as one society, which they called the Holy Roman Empire. But Protestantism limited the society to a territorial State. It placed all ecclesiastical authority under the control of the godly prince, who was omnipotent in his own domain. It brought about the unification of all powers within the State, the concentration of all coercive authority in the hands of the civil ruler and the inculcation of the duty of non-resistance to the prince. By the confiscation of church lands, the appropriation of powers formerly exercised by the Pope, and the establishment of effective control over the local clergy, the kings

'were enriched in purse, exalted in public opinion, and simultaneously freed from the fear of being hampered in their absolutist policies by an independent ecclesiastical organization'

Even in Catholic countries, Hayes tells us, the monarchs took advantage of the Pope's difficulties to wring from him such concessions as resulted in subordinating the Church to the Crown. The main change the Reformation brought about, therefore, was a change from a world empire to a territorial State, from ecclesiastical to civil predominance<sup>1</sup>

It is interesting to reflect that the political thought of the period supported absolutism in more than one way. Machiavelli freed<sup>2</sup> the ruler from the limitations imposed by public morality, he argued that the State was an end in itself, existed for its own sake, lived its own life, aimed at its own preservation and advantage, and was not bound by the obligations which should determine the actions of private persons. Hobbes, we have seen, supported absolutism by the social contract theory<sup>3</sup>. Above all, the divine right theory was worked out elaborately during this period and proved the most useful support to royal absolutism. The essentials of the theory are: monarchy is a divinely ordained institution, hereditary right is indefeasible, kings are accountable to God alone, and non-resistance and passive obedience are enjoined by God. The nation is a great family with the king as its divinely-appointed head. The duty of the king is to govern like a father, of the people, to obey their king as children obey

<sup>1</sup> According to G. P. Gooch, if the absolute State was the child and heir of the Reformation, democracy was its residuary legatee.

<sup>2</sup> *The Prince*, 1513

<sup>3</sup> *Leviathan*, 1651

their parents. Even if a king is wicked, argues king James I of England,<sup>1</sup> it means God has sent him as a punishment for people's sins, and it is unlawful to shake off the burden which God has laid upon them. Patience, earnest prayer and amendment of their lives are the only lawful means to move God to relieve them of that heavy curse!

## §2 THE FRENCH REVOLUTION

Monarchical absolutism received a death-blow at the end of the eighteenth century from the French Revolution (1789). This was a revolt of the French people against absolute monarchy and class privilege. Chief among its causes were the abuses and extravagances of the French monarchy, the unjust privileges enjoyed by the nobility and higher clergy, the discontent of the growing middle class in society, the revolutionary character of French philosophy and literature (of Rousseau and Voltaire) and the influence of the American Revolution (1775-83).

It has rightly been said that the dominant forces at work in the social and political history of Europe in the nineteenth century were the ideas or principles inherited from the French Revolution. These are mainly three—equality, popular sovereignty, and nationality.

(i) *Equality* In the Declaration of the Rights of Man—drawn up by the Revolutionaries (1789)—the doctrine of equality is proclaimed with religious fervour: 'Men are born, and always continue, free and equal in respect of their rights.' This meant primarily that all men were equal before the law, and signified the abolition of privilege, the end of serfdom, and the destruction of the feudal system. 'It involved the aspiration of affording every man an equal chance with every other man in the pursuit of life and happiness.' The Code Napoléon embodied this principle, and wherever it was set up—in the Netherlands, in the West German States, in part of Poland, in Switzerland, in Italy—it exerted the same levelling influence that it had in France. And ever since 1789, the ideal of equality has been at work emancipating and elevating the hitherto unfree and down-trodden orders of society, and removing civil, religious and race disabilities from disqualified classes in the State.

(ii) *Popular sovereignty* The declaration referred to above

<sup>1</sup> In his book, *The True Law of Free Monarchies* (1603).

stated this principle categorically. The nation is essentially the source of sovereignty, nor can any individual or any body of men be entitled to any authority which is not expressly derived from it. The law is an expression of the will of the community. All citizens have a right to concur, either personally or through their representatives, in its formation. The influence of this principle in Politics may be seen in the wide adoption, not only in Europe but in America and in the East, of the democratic form of government in place of autocratic monarchy. It is an unconscious admission of the value of the democratic principle that even where dictatorships have been established, they are disguised beneath the forms of democracy.

(iii) *Nationality* This principle, as we have seen earlier, requires that every people, who feel they are one, shall be free to choose their own form of government and to manage their affairs in their own way. The French Revolution brought about a revival of the nationalist sentiment in three ways.<sup>1</sup> First, the great wars which followed the Revolution roused and inflamed the national spirit in the French, united and inspired by the sense that they were a people with a mission. Secondly, Napoleon made conscious appeals to the national sentiment not only in France but in Poland and in Italy. And, above all, the struggle for liberation from the French yoke in Spain, Austria, Germany and Russia gave the national idea an intensity such as it had never known before and made the cause of national freedom appear the most sacred of causes. The importance of nationalism hardly needs elaboration, it has been at once a unifying and a disruptive force—dismembered nations striving for unity, and composite nations striving for separation. It has also been, throughout the modern era, a fruitful cause of wars, subject nations fighting for freedom and triumphant nations aspiring after domination.

### §3 THE INDUSTRIAL REVOLUTION

Beginning in England in the second half of the eighteenth century as a succession of mechanical inventions, the Industrial Revolution spread in due course to Belgium, France and other parts of western Europe. In the economic sphere, it substituted machine production for hand production. The small-scale pro-

<sup>1</sup> Ramsay Muir, *Nationalism and Internationalism*, pp. 71-2



duction of goods in private homes was supplanted by mass production in factories. It brought about a migration 'from farm to factory, from country to city, from agriculture to industry', and brought into relief the capitalistic system of industry, the two social classes, the bourgeoisie and the proletariat, being sharply differentiated in function and interests.

### *Its political results*

(i) It destroyed for ever the preponderant weight of the agricultural classes in the community and brought into being a new middle class, composed of factory owners, industrial capitalists, and the industrial middle class generally, who year by year became more insistent in their demand for political recognition.

(ii) It furthered the movement towards democracy.

'It has done this largely by developing city life. City life fosters democracy. Through daily contact with one another, through exchange of ideas, through increased opportunities for collective action, the dwellers of the city become less conservative than country people and more ready to engage in political activities.'<sup>1</sup>

In this way, the Industrial Revolution gave a fillip to the development of government by the people.

(iii) By prompting a policy of economic protection, it has intensified the nationalist feeling. For the only way by which a country not industrialized could hope to compete with the industrially advanced countries was to raise a tariff wall to nurse those industries which had a reasonable chance of withstanding foreign competition.

(iv) Paradoxically, it has also intensified international rivalries. The Industrial Revolution has, clearly, made the world interdependent in respect of raw materials and markets. The optimum utilization of the world's resources demands the fullest international co-operation. But the nationalist feeling, coupled with the competition among the leading industrialized nations for raw materials and markets, has resulted in the prevention of that co-operation, and in the intensification of international rivalries.

(v) The concentration of large masses of people in the cities has taught the working classes the power of organization and

<sup>1</sup> Myers, *Mediaeval and Modern History*, pp. 580-1

agitation, political and economic Through such means as the general strike, labour threatens to bring a government to its knees

(vi) The result of the Industrial Revolution on governmental policy was, in the first instance, to encourage economic liberalism or *laissez-faire* The new manufacturers wanted freedom of trade, freedom of contract, freedom of competition and free operation of the 'laws' of supply and demand, in order that they might be free to take the maximum advantage of the new inventions and increase their wealth But very soon it was found that *laissez-faire* led to social misery, an increase in the activities of the State was clearly demanded to protect the home manufacturer, the worker, the consumer and the investor, in order, briefly, to moralize competition

(vii) And, lastly, the unequal distribution of wealth in society, accentuated by modern industrial capitalism, has led to influential theories of social and political reconstruction, such as modern socialism and communism

#### §4 THE RISE OF DEMOCRACY

The hundred and twenty-five years between the French Revolution (1789) and the outbreak of the Great War (1914) are remarkable in the history of government for two developments, viz the rise of democracy and the rise of nationalism

At the end of the eighteenth century, democratic institutions of some sort could be found only in Britain, France, Holland, Switzerland and the United States of America By about 1914, there was hardly a country in Europe which did not possess a constitution of a more or less popular nature Not only in Europe but in Australia and several States of South America and Asia, a more or less democratic constitution was established. Representative parliaments, elected on an extended suffrage, and the responsibility of the Executive, in varying degrees and forms, to the Legislature and the people, are its main manifestations In some States, like Britain and Holland, the transformation was accomplished by peaceful and evolutionary methods, elsewhere, as in Austria and Italy, a revolution was necessary before the liberal principles could be accepted Some States, like Belgium and Britain, preferred to retain a constitutional monarch along with popular institutions, others, like China and France,

preferred republicanism. Switzerland went to the length of giving the people the power of direct legislation through the referendum and the initiative.

This development may be traced to four factors —

(i) *Social, economic and political conditions favouring the rise of popular government.* We have seen that the Industrial Revolution, in the latter half of the eighteenth century and in the nineteenth, furthered the movement towards democracy through the development of the middle classes, and the impetus it gave to city life. 'The opportunity to unite, which urban and factory life presented, brought with it a new consciousness of power', and the demand for political recognition. Moreover, the Revolution brought to the forefront social problems—such as the concentration of population in towns, low wages, irregularity of employment, and the threat to the health of the nation—with which the earlier monarchic and aristocratic governments were powerless to deal. The advance of popular education and the wider diffusion of knowledge, made possible by the development of the newspaper press, were favourable to the extension of the franchise. Moreover, the parliamentary system itself worked towards a widening of the electorate, 'since politicians sought the championship of an ever-increasing body of supporters'.

(ii) *Abstract theory.* Rousseau's ideal of democracy became a source of inspiration to the nations of Europe. The documents of the American and French Revolutions, based on the writings of Locke and Rousseau, proclaimed that men are born free and equal, and that government depends on the consent of the governed. The Utilitarians also 'pronounced democracy to be the only rational form of government, since the majority, if supreme, would necessarily promote the happiness of the major part of the community'.<sup>1</sup> Mill, as we have seen, argued that democracy was also the safest form of government.

(iii) *Misgovernment.* The incompetence and the vices of kings also helped the rise of democracy. Thus Portugal, before it became a Republic, was ruled by King Carlos I (1889-1908). The revolution, which ended in the overthrow of the monarchy, was the outcome of the vices, incompetence and unpopularity of the king, combined with the factious strife of parties, the troubled conditions of the country, and the corruption and inefficiency

<sup>1</sup> A. F. Hattersley, *A Short History of Democracy*, p. 165.

of the Government. The king, we are told, was licentious and extravagant and cared little for the interests of his people. Financial crises frequently occurred. The king often governed the country by ministerial decrees. Republican parties soon sprang up, in 1908 the king and the crown prince were murdered, and in 1910 the Republic was proclaimed.

(iv) *Imitation*—Imitation has always been a contributory factor in political development, particularly in the shaping of constitutions. According to Sidgwick,<sup>1</sup> we must allow a large place for it, even when we have no direct proof of it.

‘In modern Europe’, says he, ‘we cannot say that modern parliamentary government, in the form of constitutional monarchy, is an independent result of similar tendencies of development in Italy, Belgium, Spain and the Scandinavian kingdoms, where it is now<sup>2</sup> established, it is obvious to the most superficial student of history that the similarity now existing among forms of government in these different countries is largely due to imitation, direct or indirect, of England’.

Similarly, the constitution of the U.S.A. supplied a model for the rest of America.

## §5 THE DEVELOPMENT OF NATIONALISM

The second great development in Politics since the French Revolution has been the rise of nationalism.

The political ideal of the Middle Ages was universality. England was the first country to develop a strong feeling of nationalism and to attain the full stature of organized and conscious nationhood. The English attempt in the early fifteenth century to dominate France roused the national spirit in that country. Various causes led to a similar awakening in Spain and Portugal, and, by the opening of the modern age, these two countries had emerged as fully consolidated nation-States. The sixteenth century saw the Danish and Swedish peoples also similarly organized.

But the political principle of nationalism, viz. that every people who constitute a nationality have a right to independent Statehood is primarily a development of the latter half of the eighteenth and nineteenth centuries. The history of this development falls into three periods.

<sup>1</sup> *The Development of European Politics*, pp. 201

- In 1903

(i) 1772-1820 The partition of Poland (1772) is the first great landmark in this history. The territory of Poland was divided, much against the desire of the Poles themselves, among the rulers of Prussia, Russia and Austria—an act which may best be characterized as ‘downright robbery’. The Poles were left ‘as a soul wandering in search of a body in which to begin life over again’. As Lord Acton justly remarked, this most revolutionary act of the old absolutism awakened the theory of nationality in Europe.

Soon after came the French Revolution (1789) and the subjection of a large part of Europe to Napoleon. In Russia, Germany, Italy, and Spain, however, his policy soon provoked popular and spontaneous resistance—an index of the emergence of the national spirit. Indeed this awakening finally brought about the downfall of Napoleon. The statesmen who met at the Congress of Vienna at the close of the Napoleonic wars (1815), however, ignored this principle in the reorganization of Europe. ‘New States were formed, existing States were yoked together, and others were divided, in flagrant disregard of the rights of nationalities’. Thus thirty-nine sovereign princes and free cities were recognized in Germany, though bound together into a loose confederation. Venice, Lombardy and Eastern Bavaria were yoked to Austria, and the Austrian Empire made a strange mixture of races, languages and religions. Bohemians, Hungarians, Italians, Poles, Serbians, and Roumanians, held together only by their subjection to the emperor, Italy was divided into a number of States, such as Naples, Tuscany, Savoy, etc., Belgium was united to Holland, and Norway to Sweden.

(ii) 1820-78 This period saw the rise of two nation-States of the first rank in central Europe, Italy and Germany, four smaller ones in eastern Europe, Greece, Serbia, Roumania, and Montenegro, and two in western Europe, Belgium and Holland.

We have seen that the Congress of Vienna did not recognize the national sentiment in Italy, the country being split up among many small States, some of them also being placed under Austrian domination. The nationalist feeling was, however, kept alive by leaders like Mazzini (1805-72), Garibaldi (1807-82) and Cavour (1810-61), many nationalist risings took place against Austrian tyranny, until in 1871 Italian unity was achieved under Victor Emmanuel II. The struggle for Italian unity had a pro-

found influence on Germany. The first step towards German unity was taken by the creation of what is known as the Customs Union (1828-36), a sort of commercial arrangement binding the member-States to adopt among themselves the policy of free trade. It taught the people to think of a more perfect national union. It was during the regime of Bismarck<sup>1</sup> (1862-90), however, that German national unity was achieved. Bismarck was the chief minister of emperor William I of Prussia. He reformed and strengthened the Prussian army, successfully fought three wars (with Denmark 1864, Austria 1866, and France 1870-1), and, in 1871, united all the German States into the German Empire under William I.

In central Europe, nationalism was the integration of petty kindred States into two strong nation-States, in eastern Europe, it was rather the disruption of huge polyglot empires. For all the extensive lands and all the diverse nationalities of eastern Europe were comprised in three imperial sovereignties—the Russian, the Austrian and the Turkish. In the period under reference, only the nationalities comprised under the last (and not all of them) were able to achieve their independence. The Greeks were the first to revolt against the Turkish yoke. They had the sympathy of a large part of Christian Europe on their side, with this help, they were able to attain their independence in 1827. Roumania, Serbia and Montenegro similarly revolted, they were aided by Russia, and their independence had to be recognized by Turkey in 1878.

Very early in the period (1831), the Belgians secured their independence from the Dutch, with whom they had been unwillingly united sixteen years earlier by the Congress of Vienna.

(iii) *Since 1900* The separation of Norway and Sweden took place in 1905. In 1908, taking advantage of political disturbances in Turkey, Bulgaria declared her complete independence from that power. The Great War (1914-18) led to a large extension of the national principle. The large empires of Germany, Russia, and Austria-Hungary were dismembered, and six small new States, Poland, Lithuania, Latvia, Estonia, Finland and Czechoslovakia, were created. By this dismemberment, Germany, Austria, Hungary, and Turkey were also transformed into strictly national states.

<sup>1</sup> Born 1815, died 1898

' Altogether, where there had been twenty-one sovereign States in 1914 (including four extensive empires), there were twenty-seven in 1920, and almost all of the twenty-seven were national'

## §6 THE GREAT WAR (1914-18)

Besides the fillip that the Great War gave to nationalism, it was productive of other results (i) the establishment of the League of Nations, (ii) the evolution of the mandate system; (iii) the extension of democracy and republicanism, and (iv) the later rise of dictatorships

(i) The principles underlying the League of Nations have been discussed elsewhere.<sup>1</sup> Here, it is sufficient to say that its foundation was largely due to the realization by the men of the time that a concerted effort must be made to avoid the calamity of another world war and to promote international co-operation.

(ii) The establishment of the mandate system must, in principle, be taken to be an advance in the government of colonies and backward peoples. The territories taken by the Allies from the Germans and the Turks were not said to be 'conquered' but mandated by the Allied and Associated Powers, and the annexing States as mandatories were obliged at fixed intervals to give an account of their stewardship to a League Commission. The idea was that the 'civilized' nations were to be trustees for the 'backward' peoples, until such time as the latter were able to govern themselves. 'The crudity of conquest was thus diaped in the veil of morality'<sup>2</sup>

(iii) The immediate aftermath of the World War seemed to confirm Woodrow Wilson's contention that the war had been waged by the United States and the Allies to make the world safe for democracy<sup>3</sup>

'For, with the exception of Russia, where the Tsarist regime was supplanted by a communist dictatorship, all the Great Powers and most of the lesser ones adopted or elaborated democratic forms of government. And with the extension of democracy was associated a new vogue of republicanism'

Germany, Austria and Russia ceased to be monarchical and became republican. The newly created States of central Europe—

<sup>1</sup> See above, ch XI, §4

<sup>2</sup> H. A. L. Fisher, *A History of Europe*, p. 1174

<sup>3</sup> C. J. H. Hayes, *A Political and Cultural History of Modern Europe*, Vol. II, pp. 888-9

Poland, Lithuania, Latvia, Estonia, Finland and Czechoslovakia—were republican. Thoroughly democratic institutions were evolved by popularly elected assemblies in Germany (1919), Austria (1928), Czechoslovakia (1920), Poland (1921), Yugoslavia (1921), Turkey (1921), Estonia (1921), Latvia (1922), Lithuania (1922), Roumania (1923), etc.<sup>1</sup> Three features of this extension of democracy are noticeable: the adoption by several States of the British system of ministerial responsibility,<sup>2</sup> and of methods for the representation of minorities such as proportional representation,<sup>3</sup> and the enfranchisement of women. The last 'seemed an appropriate recognition of the significant role which women had played in the World War and were playing in industrialized society.'

(iv) Curiously enough, although the War resulted, immediately, in an extension of the principles of democracy, it later led to the rise of dictatorships. This is dealt with in the next section.

## §7 REACTION AGAINST DEMOCRACY

The post-war period has seen reaction against democracy, and the rise of dictatorships in a number of European States. Thus Russia has been under the Bolshevik dictatorship since the revolution of 1917. Turkey, though nominally democratic and republican, was practically under the dictatorship of Mustafa Kemal (later Atatürk) from 1921 until his death in 1938.

In Italy, a liberal Government was overthrown and the Fascist dictatorship set up in 1922. Spain was under the dictatorship of Primo de Rivera from 1923-30, Portugal under that of General Carmona from 1926-33.<sup>4</sup> In Yugoslavia King Alexander, with the support of the army, dissolved the Parliament early in 1929, suspended the constitution and proclaimed himself dictator. Germany virtually gave up her republican government for the Nazi dictatorship in 1933.

These dictatorships have certain features in common. Wherever they have been established, there has been a clouding, especially among the middle classes, of the liberal and democratic conscience. The belief in the utility of responsible cabinets, representative assemblies and democratic electorates has declined. And so has that strong belief in civil liberty and peaceful persua-

<sup>1</sup> Hayes, *op. cit.*

<sup>2</sup> See below, ch. XXVII, §5.

<sup>3</sup> See below, pp. 245-50.

<sup>4</sup> Salazar, *Doctrine and Action*, p. 27.



sion which had been a distinctive feature of the nineteenth century. It is no longer regarded as the mark of a civilized polity that every citizen should be able to think as he likes, to speak as he likes and to vote as he likes. Dictatorships make the maximum use of force in government. They employ the secret police on a large scale—the OGPU in Russia, the Gestapo in Germany—to discover and put down opposition. Their principle is ‘no opposition to the party in power, and no opposition within the party’. They therefore refuse to tolerate organized minorities and insist on State monopoly of those forces—the press, the radio, the film, etc.—which mould public opinion. They have all taken on a violently nationalistic colour. Many of them express themselves through constitutional forms. Hitler is constitutionally the president and Chancellor of the German Republic, Mussolini was Prime Minister to the King of Italy.

### *Causes*

The primary cause for the growth of dictatorships (the Russian excepted) has been a certain dissatisfaction with democracy and parliamentary institutions. This reaction against democracy is itself traceable to four causes.

(i) *The Great War* The mere fact of the outbreak and the continuance of the war, and the sufferings which followed, helped to shake men’s faith in democratic principles. Men had thought that democracy and peace were synonymous, but the events of August 1914 destroyed this illusion.<sup>1</sup> Again, the war left a legacy of misery and depression in nearly every country. Men looked for a better and happier world after the war, the world that did result was not only not better, but worse. It was freely contended that parliaments were bankrupt and that democratic civilization had outlived its usefulness. Further, during the war period there was everywhere a strengthening of the Executive at the expense of the Legislature and a considerable curtailment of personal liberty, the ordinary citizen did as he was bid, and the habit has endured.<sup>2</sup>

(ii) *The weakness of democratic governments* Even apart from the war, the faith in democratic principles has been undermined by the inability of democracy to solve adequately the problems which it has had to face.

<sup>1</sup> Petrie, *The History of Government*, pp. 163-4

<sup>2</sup> *ibid*

This is particularly true of post-war Germany and Italy. In both these countries, the democratic institutions were charged with incompetence and indecisiveness. The necessity for a strong government, for centralized and unlimited authority, was stressed on every hand. In Germany, the inflation of 1923 resulted in untold miseries. Again, from 1929, following close upon the financial crash in New York and the consequent withdrawal of American money from Germany, there was a serious economic crisis. The budget was unbalanced, six millions were unemployed, and the cult of communism gained ground. The humiliations consequent on defeat in the war added to the resentment of the people against their Government. The revolution in Germany accomplished by Hitler and his National Socialist party is, therefore, an extraordinary psychological phenomenon.

'The dread of communism, the hatred of Jews and profiteers, the desire once again to be feared abroad, the need of a Government stronger, more progressive, and more sanguine than the Republic, which would repudiate the Peace Treaties and once more launch Germany on the course of ambition and honour, all contributed to make Hitlerism possible'<sup>1</sup>

In Italy, much the same state of affairs existed. She was disgusted with the hollowness of her victory. The territories ceded to her by the Peace Treaties were not as many as she had been led to believe, at home, there was privation instead of the expected prosperity. The high cost of living, unemployment and bad trade added to the unpopularity of the Government. Riots occurred in several parts of the country. The trend towards communism, encouraged by the success of the Bolshevik revolution in Russia, alarmed the industrialists and the middle class who feared the destruction of their property. Mussolini, supported by the Fascists, demanded and secured control of the Government by his march on Rome (1922).

(iii) *The lack of democratic traditions* It must be admitted, too, that those countries, in which dictatorships were established, like Italy and Germany, lacked democratic traditions, which alone could have enabled them to preserve democracy.

(iv) *The personal factor* The rise of dictatorships, in reaction against democracy, must in part be attributed to the

<sup>1</sup> Fisher, op cit, pp 1204-5

rise of strong men, like Hitler and Mussolini, who, at a time of emergency, provided the leadership for which the masses were longing

The Russian instance, we have said, is an exception it is so only in the sense that that dictatorship was not a reaction against democracy but against hereditary autocracy Otherwise much the same reasoning applies The inefficiency and corruption of the Tsarist Government, the military reverses, and the suffering consequent on the war, led to discontent and the spread of revolutionary ideas Lenin, the strongest personality of the age, and a disciple of Marx, captured the government (1917) and established the dictatorship of the proletariat

### *Comparison with ancient dictatorships*

The rise of dictatorships in modern times naturally reminds the student of government of a similar development in ancient times The Greek tyrants, we have seen, came to power to deal with an emergency They championed the cause of those who were discontented with oligarchy They meant their office to be permanent They helped to destroy oligarchy and prepare the way for democracy Nevertheless, they were regarded as irregular and unconstitutional by Greek sentiment

Like the tyrants of Greece, the Roman dictator came to power to deal with an emergency But, unlike the tyrant, the Roman dictator was, in the great days of the Republic, a constitutional official, appointed by legal process and exercising his authority in accordance with legal conventions He was expected to lay down his office as soon as the special business for which he had been appointed was accomplished, and in no case could his tenure exceed six months

Modern dictatorships are not all of one type the Russian dictatorship of the proletariat, for instance, differs from its fascist Italian counterpart But in origin they are essentially like the Greek *tyrannis* in that they came into existence in an irregular manner (in Russia by a revolution, in Italy by the fascist march on Rome), though, later, they express themselves through constitutional forms Again, the methods they adopted to maintain their power recall the prescriptions outlined by Aristotle (and adopted by ancient tyrants) for the preservation of tyranny the tyrant should lop off all those who are too high ;

he must put to death men of spirit, he should endeavour to know what each of his subjects says or does, and should employ spies, he should also endeavour to engage his subjects in a war so that they may have something to do and be always in want of a leader. They agree in four other respects: the dictators have come to power by championing the cause of the discontented, they depend on force, they mean their office to be permanent, they have helped to bring some order out of chaos. But they differ from Greek tyrants in that (a) at least in Germany and Italy, they have helped to destroy the prevailing democratic forms of government, and (b) with the aid of modern methods of propaganda, they are able to mould public opinion according to their will and to manufacture consent, and so, perhaps, their systems are likely to last longer than ancient tyrannies.

### *Dictatorship versus Democracy*

No realist can ignore the services rendered by dictators to their peoples. They have successfully faced problems with which preceding regimes were afraid to deal, provided employment to the unemployed, increased industrial production, promoted literacy and public health, and raised the prestige of their respective countries in international politics—witness the phenomenal rise of Germany and Russia to power and prosperity. The following summary of the achievements of the Spanish dictator Rivera is typical:

‘For the first time in their history the Spanish trains ran punctually. New railways were laid down, and a system of fine motor roads took the place of the traditional mule-tracks of Spain. Commerce and industry prospered under the dictator. Agriculture flourished. Labour unrest was mitigated.’<sup>1</sup>

But dictatorship, as a form of government, has many evils. Men towering above their fellows in wisdom, foresight, and capacity to rule are difficult to find.<sup>2</sup> Even if one dictator is wise and capable, his successors may not be. Dictators may deteriorate. ‘All power corrupts’, said Lord Acton, ‘and absolute power corrupts absolutely.’ Further, dictatorship tends to attack the essential character of the modern State as a *Rechts-staat*, i.e. one based on the rule of law<sup>3</sup> as distinguished from the rule

<sup>1</sup> J. H. Jackson, *Europe since the War*, p. 98.

<sup>2</sup> G. P. Gooch, *Dictatorship in Theory and Practice*, pp. 35-40.

<sup>3</sup> *ibid*.

of arbitrary power. It also repudiates liberty. In such a State, as has been well said, there are no human rights but only State rights. It stresses the cult of violence. Force is a necessity in an imperfect world as the guardian of right, but if it is not embodied in law,<sup>1</sup> it becomes dangerous. The cult of violence involves dangers without as well as within, for, at least, fascist dictators do not believe in pacifism, and war becomes more likely. Mussolini has said that he believes neither in the possibility nor the *utility* of perpetual peace.

A democratic system is to be preferred because of the importance which it attaches to human personality. The democratic method is to reach decisions by discussion, argument, and persuasion. In a dictatorship, violence takes the place of argument. Democracy does not believe in the suppression of thought; dictatorship not only believes in it but also in creating a like-mindedness. Dictatorship, therefore, eliminates the best from public life, the critical minds as well as the creative brains. Further, it depends on a person rather than on a principle, it depends on the intelligence, the capacity and resourcefulness of a single individual, and it is unsafe to entrust to the hands of a single individual the destinies of a country. By its very nature, therefore, dictatorship can never be a permanent or desirable substitute for democracy.

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<sup>1</sup> Gooch, *op cit*

## BOOK II MODERN CONSTITUTIONS

### CHAPTER XVI

## THE GOVERNMENT OF BRITAIN

### §1 INTRODUCTORY

We have surveyed briefly the history of government, and now proceed to a study of the systems of government in force today in some of the most important States

A few words in explanation of the order of treatment will be useful

In this chapter and the following, is outlined the system of government in Britain and France, both these are *unitary* States. Unitarianism, Dicey has said, is the habitual exercise of supreme legislative authority by one central power. It is contrasted with federalism, which involves the division of governmental powers within the State between one central authority and a number of local or 'state' authorities, the former passing laws and administering them in respect of *some* matters, like defence and foreign affairs, and the latter, in respect of *other* matters of a more local nature, like education and agriculture. The United States of America, Canada, Australia, and Switzerland are *federal* States, these and South Africa (usually classed as a union) are taken up for study in chapters XVIII, XIX and XX

Chapter XXI deals with Germany, Italy and the Union of Soviet Socialist Republics (the first two, unitary, the third, federal) which differ from the above-mentioned *democratic* States so much in their fundamental nature that they form a class by themselves. They are *totalitarian* States. The difference between the two types of States is that a democracy makes a distinction between State and society, a totalitarian State does not

And, finally (in chapter XXII), is given a brief account of the Government of India, which also in some ways is in a class by itself. For India today is, strictly speaking, neither unitary nor federal, it is partly unitary and partly federal. It is also (while in no way totalitarian), not a fully democratic State, though on the way to becoming one

§2 THE CONSTITUTION OF BRITAIN

We consider the government of Britain first, primarily for the reason that British political institutions have had a profound influence on shaping the governmental systems of other countries, and therefore an acquaintance with them helps to a clear understanding of those systems

Let us ask ourselves a preliminary question What is meant by the term 'the constitution of Britain'? A constitution, in general terms, is the body of rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State It is, in a classic definition, the collection of principles according to which the powers of the Government, the rights of the governed and the relations between the two, are adjusted. The constitution of India, for instance, is found in the Government of India Act, 1935, that Act contains the most important of the rules which affect the distribution and the exercise of sovereign power in India—the rules relating to the powers of the Secretary of State for India, the Governor-General, the Governors, the composition and powers of the central and provincial Legislatures, etc Britain has no such document containing all or the most important of the rules relating to her constitution Several of these rules are found scattered through a number of charters and petitions like the Great Charter (1215)<sup>1</sup> and the Petition of Right (1628),<sup>2</sup> statutes like the Parliament Act of 1911,<sup>3</sup> and judicial decisions like the decision in Wilkes' case<sup>4</sup> (1763), some indeed are unwritten usages or constitutional conventions<sup>5</sup> Whether we can call such a constitution as this an unwritten one is a debatable point, to which we shall refer later<sup>6</sup> It is sufficient here to stress the fact that the constitution of Britain is derived from several sources, it is a composite of charters, statutes, judicial decisions and usages

This constitution can be amended in the same way as ordin-

<sup>1</sup> The Great Charter guaranteed the liberties of the English Church, and among other things, provided that 'no freeman shall be taken or imprisoned save by the lawful judgement of his peers or by the law of the land', and that 'no scutage or aid shall be imposed in our kingdom except by the common council of our kingdom' except for certain specified purposes

<sup>2</sup> The Petition of Right declared that taxes could not be levied without consent of Parliament, that Englishmen could not be imprisoned without cause shown and trial given, and that soldiers and sailors could not be billeted on private householders without their consent

<sup>3</sup> See below, §6

<sup>5</sup> See below, §16

<sup>4</sup> See below, §13

<sup>6</sup> See below, ch XXV, §1

### §3] THE CROWN ITS POSITION AND POWERS

any laws are passed and amended. Thus a law relating to the Crown, like the Act of Settlement (1701), is passed by Parliament and assented to by the king, in the same way as an education or a public health Act is put on the statute book. Such a constitution, which does not require any special procedure or body for making constitutional laws, is known as a *flexible* constitution, in contrast to a *rigid* one which provides a special procedure for the purpose.

We shall now consider, in order, the Executive, the Legislature and the Judiciary of Britain.

### §3 THE CROWN ITS POSITION AND POWERS

The supreme executive authority in the State is vested in the Crown.

The Crown is a hereditary institution which Parliament regulates by rules of succession. Under the terms of the preamble to the Statute of Westminster (1931), 'any alteration in the law touching the succession to the throne or the royal style and titles' requires the assent of the Parliaments of all the Dominions as well as that of the Parliament of the United Kingdom. The succession is now governed by the Act of Settlement (1701). Briefly, this provided that in default of heirs of the then reigning king, William, and of his expected successor, Anne, the Crown, together with all its prerogatives, should 'be, remain, and continue to the most excellent Princess Sophia,<sup>1</sup> and the heirs of her body, being Protestants'. Within the reigning family, the throne passes according to the principle of primogeniture, 'elder sons being always preferred to younger, and male heirs to female'. Provision has been made by Parliament for the setting up of a regency for the performance of the king's duties in the event of his absence, infancy, insanity, ill health, or unfitness to rule.

The sovereign must not only be a Protestant, but may not marry a Catholic. He is required to take a coronation oath to the effect 'that he is a faithful Protestant and that he will, according to the true intent of the enactments which secure the

<sup>1</sup> A granddaughter of James I (1603-25). The present king, George VI, is the tenth in succession from George I (Sophia's son) who, in accordance with the Act, succeeded Anne in 1714. According to the Abdication Act 1936, the issue, if any, of King Edward VIII, and the descendants of that issue, shall not have any right to the succession.



Protestant succession to the throne of the realm, uphold and maintain the said enactments to the best of his powers'.<sup>1</sup>

He is not answerable to any court of law, and cannot be arrested. At the beginning of his reign, he is voted a 'civil list',<sup>2</sup> i.e. a yearly allowance from the public funds for his personal and court expenses.

The most important powers of the Crown are

(i) It enforces national laws, appoints and removes officers and directs the work of administration, manages the country's foreign relations and makes treaties, and conducts its dealings with the colonies, Dominions, and dependencies, and holds supreme command over the armed establishments

(ii) It summons Parliament, and prorogues and dissolves it, a speech 'from the throne' is read at the opening of a new Parliament, every law requires the assent of the Crown, orders-in-council are passed in its name

(iii) It is the fountain of justice, and in that capacity appoints judges, 'and wields the power of pardon and reprieve, subject only to the restriction that no pardon may be granted in cases in which a penalty has been imposed for a civil wrong or by impeachment'

(iv) It is the head of the Established Churches; as the head of the Anglican Church in England, it appoints the bishops and archbishops, as head of the Church of Scotland, its function, as A. B. Keith pointed out,<sup>3</sup> is insignificant

(v) Finally, it is the 'fountain of honour', titles are awarded, as for instance the Honour Lists published at the New Year and on the king's birthday, in the name of the king

### *The 'Crown' and the 'sovereign'*

The Crown has, however, to be distinguished from the sovereign, according to Gladstone,<sup>4</sup> this distinction is most vital to the practice of the British constitution and to right judgement upon it. The term 'sovereign' refers to the king as an individual; the term 'Crown', to kingship as an institution, and means, as we have seen, the supreme executive authority in the State.

<sup>1</sup> F. A. Ogg, *European Governments and Politics*, p. 53

<sup>2</sup> King George VI is allowed £410,000 a year, with exemption from income-tax

<sup>3</sup> *The King and the Imperial Crown*, pp. 371-3

<sup>4</sup> *Gleanings of Past Years*, Vol. I, p. 234

### §3] THE CROWN ITS POSITION AND POWERS

The king as an individual does not on his own initiative exercise the powers of the Crown, he exercises them on the advice of his ministers who are chosen from, and are responsible to, the Parliament representing the people. There was a time in the history of Britain when the king did himself exercise the powers; but the gradual evolution of democracy has made it necessary for him to be a nominal ruler. The king reigns, but does not govern.

'There is not a moment in the king's life, from his accession to his demise,' said Gladstone, 'during which there is not some one responsible to Parliament for his public conduct, and there can be no exercise of the Crown's authority for which it must not find some minister willing to make himself responsible.'

Thus when he summons, prorogues or dissolves Parliament, or reads a 'king's speech', or declares peace or war, or appoints to the highest executive offices of State, everyone knows that he does not act on his own responsibility.

It will, however, be a grave error to conclude, as the foregoing account might suggest, that the sovereign as a person has no influence on the affairs of State. That great authority, Gladstone, has said that the substance of the change that has occurred in the position of the monarchy since the end of the seventeenth century has been a 'beneficial substitution of *influence* for *power*'<sup>1</sup>. The whole authority of the State periodically returns into the royal hands whenever a ministry is changed. During the interval between the retirement of one Government and the appointment of another, the king is the depositary of power<sup>2</sup>. Moreover, it is his personal duty to decide which of the leaders of the majority in Parliament shall be entrusted with the premiership. The right to commission a particular statesman to form a ministry remains, though it is conditioned by the fact that the sovereign's field of choice is narrowly restricted<sup>3</sup>. Again, in the determination of policy and in administration, the sovereign has, in Bagehot's oft-quoted words, three rights: the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity, Bagehot adds, would want no others.

'He would find that his having no others would enable him to use these with singular effect. He would say to his minister, "The responsibility of these measures is upon you. Whatever

<sup>1</sup> *ibid*, p. 38; italics ours

<sup>2</sup> S. Low, *The Governance of England*, p. 263

<sup>3</sup> *ibid*

you think best must be done Whatever you think best shall have my full and effectual support But you will observe that for this reason and that reason what you propose to do is bad , for this reason and that reason what you do not propose is better I do not oppose, it is my duty not to oppose , but observe that I *warn* " " <sup>1</sup>

It ought to be emphasized that the right of the sovereign to be consulted is an important one , it is on record that more than one sovereign insisted on this right The classic example is that of Queen Victoria

'She requires', states one of her memoranda,<sup>2</sup> '(1), that he (Lord Palmerston) will distinctly state what he proposes in a given case, in order that the queen may know as distinctly to *what* she is giving her royal sanction , (2) having *once given* her sanction to a measure, that it be not arbitrarily altered or modified by the minister. . She expects to be kept informed of what passes between him and the Foreign Ministers before important decisions are taken, based upon that intercourse , to receive the foreign Dispatches in good time, and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off'

The warning given by a monarch cannot be lightly ignored by a minister, for it must be remembered that the former speaks from the vantage ground of an exalted station and a relatively greater experience 'A king,' said Peel, 'after a reign of ten years, ought to know much more of the working of the machine of government than any other man in the country' The monarch has one further advantage over his ministers he is in a position to rise above parties and partisanship, for his personal fortunes are hardly affected by party politics Undoubtedly, we may add, a good deal of the effective influence of the monarch depends upon his personality and the attention he devotes to affairs of State

#### §4 THE SERVICES OF MONARCHY

Monarchy has endured in Britain for several reasons. First, the British are essentially conservative by temperament , they hardly like to give up an institution which has been with them for ages Secondly, little is gained by abolishing monarchy.

<sup>1</sup> W Bagehot, *The English Constitution*, ch III

<sup>2</sup> *Letters of Queen Victoria*, 1st Series, Vol II, p 315 Queen Victoria to Lord John Russell, 12 August 1850

The institution costs the nation but a fraction of one per cent. of the annual budget. Further, the tradition is now well established that the king does not govern, but only reigns, and, therefore, the existence of monarchy does not act as a brake on the popular will, monarchy has now definitely become 'constitutional'. And even if kingship is abolished, some titular head, independent of electoral influences, would seem to be necessary in the place of the king. Thirdly, and above all, monarchy performs some distinct services to the nation. The presence of the king helps to give some continuity to executive policy. The traditions which surround a monarchy of long continuance help to inspire the actual heads of the Government with a sense of responsibility and dignity. The king acts as a useful counsellor to the real political heads of the State. He is the symbol of imperial unity, especially necessary after the passing of the Statute of Westminster (1931), which made the Dominions practically autonomous, the British Parliament and the British cabinet have no powers to interfere in the affairs of the Dominions. He is also the head of British society, expected to set standards of social life.

### §5 THE CABINET

The cabinet is the real, as distinguished from the nominal, Executive in Britain. It has been defined as a body of royal advisers chosen by the prime minister in the name of the Crown with the tacit approval of the House of Commons. It is, in Bagehot's phrase, a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. Its importance in the British political system is indicated in such descriptions of it as 'the keystone of the political arch' (Lowell) and 'the steering-wheel of the ship of State' (Ramsay Muir).

The cabinet must be distinguished from the Privy Council and the ministry. It is a much smaller body than the Privy Council. All members of the cabinet (about 20) are members of the Privy Council, but all members of the Privy Council (about 320) obviously are not members of the cabinet. The practice is for all members of the incoming cabinet to be appointed to the Privy Council, unless they are already Privy Councillors; and they remain privy councillors for life.

It is also smaller than the ministry. The ministry is about

40<sup>1</sup> strong and consists of all the Crown officials who have seats in Parliament, are responsible to the House of Commons, and hold office so long as they command the confidence of the working majority in that body, the cabinet consists only of some twenty of these <sup>2</sup> All cabinet members are ministers, but not all ministers are cabinet members. Further, the two differ in their functions: the ministry, unlike the cabinet, does not meet as a body for the transaction of business, for it has no collective functions in respect of the determination of policy or of administration. The function of a non-cabinet minister is to be in charge of a particular portfolio of government; that of a cabinet minister, in addition, is to help in determining, along with his colleagues, the general policy of the Government in all departments and to control administration.

The choice of the ministers to be included in the cabinet depends on the prime minister. Invariably the Chancellor of the Exchequer, the important Secretaries of State such as those in charge of foreign affairs, the Home Office, the War Office and the India Office and the ministers of health and labour are members of the cabinet, the others are included or not according to the wishes of the prime minister.

The formal appointment of the members of the cabinet is, of course, made by the king. The first step in its formation is for the king, on the resignation of one cabinet, to send for the leader of that political party which controls a majority in the House of Commons and ask him to 'form the ministry'. If no single party commands a majority (as happened in 1924 and 1929), he invites the leader of that party, who can, either through a coalition or otherwise, assure himself of a majority or of sufficient support to undertake the responsibility of government. This leader is designated the prime minister, he suggests to the king the names of the other members of the cabinet, and of other ministers. Technically he has a free hand in his choice, in practice, he has to take into account the need for maintain-

<sup>1</sup> According to the *Statesman's Year-book*, 1943, the 40 ministers were distributed as follows: (i) the War Cabinet, 9, (ii) Ministers not in the War Cabinet, 22, (iii) other ministers, 9.

<sup>2</sup> In addition to the ordinary Cabinet, there has been since September 1939 (when the war began) a War Cabinet which now consists of 9 members. Their primary duty, as the name suggests, is to see to the proper direction of the war. The War Cabinet was the invention of Lloyd George who constituted one during the war of 1914-18.

ing party solidarity and the claims of senior men in the party who have once served as ministers and are available for service; for recognizing ability among the younger men, for representing social, economic, and religious groups in the cabinet, for satisfying regional claims, for including members from both Houses of Parliament, and, above all, for getting together a team of really able men, including a variety of talents, who will work together under his leadership. The task is not easy, Disraeli considered it 'a work of great time, great labour, and great responsibility'. Having got together his list, the prime minister submits it to the king, who approves of it. Every minister of the Crown must be a Member of Parliament,<sup>1</sup> of one House or the other; if he is not one at the time of appointment, he has to become one, either by being made a peer, or by a 'safe constituency' being made available for him. The prime minister, it must be added, also assigns to each minister his individual portfolio, in consultation with him and with others.

The functions of a cabinet are succinctly set out in the *Report of the Machinery of Government Committee* (1918) as (i) the final determination of the policy to be submitted to Parliament, (ii) the supreme control of the national Executive in accordance with the policy prescribed by Parliament, and (iii) the continuous co-ordination and delimitation of the authorities of the several departments of State.

The first involves the preparation and approval of the legislative programme for each session of Parliament. Government measures are introduced, explained and defended on the floor of Parliament by members of the cabinet. The cabinet thus supplies an effective leadership to Parliament in legislation. It also approves of the 'king's speech', determines its attitude to the bills introduced by private members of Parliament, and discusses the annual budget before it is introduced in Parliament. The second involves the determination of how the executive authority vested in the Crown—in respect of appointments, foreign affairs, etc.—shall be exercised. The third involves a general control and the co-ordination of the work of the several departments of the Government.

<sup>1</sup> This is a well-settled convention. There have been occasional exceptions. For example, Mr Gladstone once held office out of Parliament for some months in 1845-6.

From 1916, there has been a cabinet secretariat to help the cabinet in the performance of its functions. Its duties are <sup>1</sup>

(i) To circulate the memoranda and other documents required for the business of the cabinet and its committees

(ii) To compile under the direction of the prime minister the agenda of the cabinet and, under the direction of the chairman, the agenda of a cabinet committee

(iii) To issue summons of meetings of the cabinet and its committees

(iv) To take down and circulate the conclusions of the cabinet and its committees and to prepare the reports of cabinet committees

(v) To keep, subject to the instructions of the cabinet, the cabinet papers and conclusions

The political characteristics of the cabinet may now be summarized <sup>2</sup>

✍ (i) *The exclusion of the king* The king does not attend the meetings of the cabinet. This practice dates from 1714 and arose from the circumstance that George I, the then reigning king, did not know the English language. The importance of this practice is, in the words of J. A. R. Marriott, that so long as the sovereign sat at the Council-board, some degree of political responsibility attached to him; but the irresponsibility of the sovereign is a condition precedent to the complete responsibility of his servants

➤ (ii) *The close correspondence between the cabinet and the parliamentary majority for the time being* This is secured, as we have seen, (a) by the practice of asking the leader of that party which has a majority in Parliament to form the cabinet; and (b) by the rule that every minister of the Crown must be a member of one or other House of Parliament

↪ (iii) *The political homogeneity of the cabinet* This indeed follows from (ii) above. It means that the members of the cabinet hold the same political opinions. The differences among them, if any, are expected to be resolved by mutual discussion, and are not, at any rate, made known to the public. From 1931 to the present there has been a 'national' Government, consisting

<sup>1</sup> W. I. Jennings, *Cabinet Government*, p. 189

<sup>2</sup> This analysis to some extent follows J. A. R. Marriott's in his excellent study, *English Political Institutions*, ch. IV

of members drawn from three different parties, but this does not substantially violate the principle of political homogeneity, for, in so far as the members thereof have tacitly agreed to work on the principle of collective responsibility, explained below, some degree of political homogeneity is inevitable

(iv) *Political responsibility to the House of Commons* The members of the cabinet 'are answerable to the House for every policy that they embark upon, and for every action that they take'; they hold their office only so long as they command the confidence of the House of Commons, when they cease to have it, by convention they resign. It follows that the policy which they adopt must be acceptable to the House. The House can indicate its want of confidence by rejecting a bill introduced by a minister, passing a non-official bill opposed by the cabinet, refusing supply, reducing the salary of ministers and, finally, by a vote of 'want of confidence'.

This responsibility is, further, collective. This means in the oft-quoted words of Moiley,<sup>1</sup> that

'as a general rule every important piece of departmental policy is taken to commit the entire cabinet, and its members stand or fall together. The Chancellor of the Exchequer may be driven from office by a bad dispatch from the Foreign Office, and an excellent Home Secretary may suffer for the blunders of a stupid Minister of War. The cabinet is a unit—a unit as regards the sovereign, and a unit as regards the Legislature. Its views are laid before the sovereign and before Parliament, as if they were the views of one man. It gives its advice as a single whole, both in the royal closet, and in the hereditary or the representative chamber. The first mark of the cabinet, as that institution is now understood, is united and indivisible responsibility'

For all that passes in the cabinet, each member of it who does not resign is absolutely and irretrievably responsible, and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues.<sup>2</sup>

We must perhaps add, for the sake of avoiding confusion, that the ministers are, in addition to being *politically* responsible to the House of Commons, *in law* responsible to the king, for he appoints and dismisses them, they are further, in common with other officers of government and according to the principle

<sup>1</sup> *Life of Walpole*, 1913, pp 155-6

<sup>2</sup> *Life of Robert Marquis of Salisbury*, Vol II, pp 219-20, cited by Jennings, op cit, p 217



of 'the rule of law', liable before a court of law in case any act of theirs is illegal.

(v) *The ascendancy of the prime minister* The prime minister is, in the words of Morley, the keystone of the cabinet arch.

'Although in cabinet all its members stand on an equal footing, speak with equal voice, and, on the rare occasions when a division is taken, are counted on the fraternal principle of one man, one vote, yet the head of the cabinet is *primus inter pares*, and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority.'<sup>1</sup>

An enumeration of his most important functions<sup>2</sup> proves the correctness of Morley's estimate. With the king's consent, he appoints and dismisses ministers and exercises a wide patronage. He presides over the meetings of the cabinet, is consulted by other ministers on the major problems of their departments, settles disputes between departments, controls the cabinet secretariat, and is generally responsible for seeing that departments carry out cabinet decisions. Often he is leader of the House of Commons. He is leader of his own parliamentary party, and invariably of his party outside. He is in communication with the prime ministers of the Dominions. He is the confidential adviser of the Crown and the ordinary channel of communication between the Crown and the cabinet. The power of the prime minister is indeed great. As Sidney Low says, backed by a stable, substantial majority in Parliament, his range of political action is scarcely limited. An English prime minister, with his majority secure in Parliament, can alter the laws, he can impose taxation and repeal it, and he can direct all the forces of the State. The one condition is that he must keep his majority.

Finally it is necessary to mention that the prime minister's power is largely due to the fact that indirectly he is the nominee of the political sovereign of the State, the electorate. He is returned to power as the leader of a party, whose policy has been explained to the nation at the general election and approved by them.

## §6 THE HOUSE OF LORDS

The king-in-Parliament, i.e. the king, the House of Lords, and the House of Commons, constitute the law-making body in Britain.

<sup>1</sup> Morley, *Life of Walpole*, p. 157.

<sup>2</sup> See Jennings, *op. cit.*, pp. 153-4.

The House of Lords is largely based on the hereditary principle. It has nearly 750 members, the number varying through deaths and the creation of new peerages. These fall into five categories.

(i) *Hereditary peers* About nine-tenths of the members of the House are hereditary peers. It may be mentioned that peerages are created by the Crown, and descend to the eldest male member of the family, the other members of the family are commoners, and a peerage can neither be alienated or transferred to another nor surrendered to the Crown<sup>1</sup>.

(ii) *Representative peers of Scotland* When Scotland was united with England by the Act of Union (1707), there was in existence a Scotch peerage, with 154 members. They were given the right of electing 16 of their number to represent them in the House of Lords for the duration of each Parliament.

(iii) *Representative peers of Ireland* Similarly, when Ireland was united with Great Britain by the Act of Union (1801), there was a separate Irish peerage with 234 members. It was provided that the Irish peers should elect 28 from among themselves for life to represent them in the House of Lords. After the creation of the Irish Free State, it was announced by the prime minister in 1923 that vacancies among the Irish representative peers would not be filled until further legislative provision was made. No such provision has since been made, with the result that now there are only about 15 Irish representative peers.

(iv) *Lords of appeal in ordinary* There are seven of them, appointed for life. The reason for introducing this element was to enable the House to fulfil adequately its judicial functions, noted below. They are chosen from among distinguished jurists and, unlike other members of the House, are paid an annual salary.

(v) *Spiritual peers* The two archbishops, and twenty-four bishops of the Anglican Church (normally the bishops of London, Durham and Winchester and twenty-one other sees chosen in order of seniority), sit in the House by virtue of the writs of summons issued to them.

Persons under twenty-one years of age, aliens, bankrupts, persons serving a sentence on conviction of felony or treason, and women are ineligible to sit in the House of Lords.

<sup>1</sup> W. R. Anson, *The Law and Custom of the Constitution*, Vol. I, p. 210

<sup>cellor</sup> Of its organization and procedure, the essential features are the following. The Lord Chancellor, a member of the cabinet, and invariably a member of the House of Lords, is the presiding officer. Three members constitute a quorum, though in order to pass a legislative measure at least thirty members must be present. Normally the sessions of the House of Lords are co-incident with those of the House of Commons, though the days and the hours of sitting are not always the same. There are several committees in the House of Lords, as in the House of Commons, it is not necessary to refer to them because, on account of the smaller attendance in the House, invariably bills, after two readings, are debated in Committee of the whole House, before being read a third time. If the House makes amendments to a bill which comes from the Commons, the measure goes back to them for concurrence.

<sup>ve</sup> The powers of the House of Lords are threefold. judicial, legislative, and deliberative.

<sup>l.</sup> It is the supreme court of appeal for cases in the United Kingdom of Great Britain and Northern Ireland and a court of impeachment for the trial of important officers of the Crown. Impeachments have long been out of use (the last one was in 1805), there is no need for them as the principle of ministerial responsibility is now well established. The function of the House as the highest court of appeal is merely a historical survival. Actually, the House as a whole takes no part in the work, which is left to those of its members who have held high judicial offices together with the law-lords. As Ramsay Muir has noted, the law court which is called "the House of Lords" is in reality quite distinct from the legislative assembly of that name.

<sup>five</sup> The legislative powers of the House were until 1911 equal to those of the House of Commons in respect of ordinary bills and somewhat inferior in respect of money bills, i.e. the Lords could initiate ordinary bills, and amend and reject those which came from the House of Commons. and, in theory at any rate, they had the power to amend and reject money bills, though this power was rarely used. This position was radically altered by the Parliament Act of 1911. This Act was 'provoked' by the rejection by the Lords of the finance bill of 1909, providing for a tax on increase in land values, a constitutional crisis ensued, and resulted in the passing of the Parliament Act.

## §7] IS THE HOUSE OF LORDS SATISFACTORY?

(i) It provided that money bills, if passed by the House of Commons, should become law one month after such passage; even though the Lords should withhold their concurrence. The term 'money bill' is so defined as to include measures relating not only to taxation but also to appropriations, loans, and audits; and the Speaker of the House of Commons is given the absolute power to decide whether a given measure is or is not a money bill within the meaning of the Act.

(ii) Public bills, other than money bills or a bill containing any provision to extend the maximum duration of Parliament beyond five years, may become law without the consent of the Lords provided (a) that they have been passed by the Commons in three successive sessions of the same or consecutive Parliaments and (b) that two years have elapsed between the date of the second reading of the bill in the first of those sessions and the date on which it passes the House of Commons in the third of those sessions.

Briefly, the Parliament Act reduced the House of Lords to a definitely subordinate position. It deprived it practically of all powers in regard to money bills and limited its power over general legislation to a suspensive veto of two years. It is, however, worth mentioning that the House may still, through its power to delay, exercise considerable power in respect of non-financial bills. A Labour Party Government, eager to carry out progressive socialistic legislation, may find the delay inconvenient and irritating. Legislation apart, the House of Lords is a ventilating chamber; it may discuss any problems of public importance, social, economic and political.

## §7 IS THE HOUSE OF LORDS

### A SATISFACTORY SECOND CHAMBER?

The tests of a good second chamber are twofold. (i) It must be composed differently from the first so that it may not be a mere duplication of a popularly elected first chamber; it must thereby help to bring to the work of legislation and deliberation men with additional qualifications, and, if possible, superior to those of the members of the other chamber. (ii) While it should help to revise the laws passed in the other chamber, it must not be a rival to it or be an obstruction.

Judged by these standards, the House of Lords has, clearly,

both merits and defects. It is differently composed from the popularly elected House of Commons. The members of the House, too, are men of considerable ability Says a competent authority <sup>1</sup>

‘It is doubtful whether, by and large, the actual working House of Lords is surpassed in its resources of intelligence, integrity, and public spirit by the House of Commons Industry, finance, agriculture, science, literature, religion—all are represented there Spiritual and intellectual as well as material forces find expression The country is served from the red leather benches by men who have built up its prosperity, administered its great dependencies, risen to its highest positions in law, diplomacy, war, statecraft, and learning’

Even its worst critics admit that the debates in the House of Lords reach a very high level, a discussion of colonial problems participated in by such distinguished proconsuls as Curzon, Cromer (the maker of modern Egypt) and Milner (sometime Governor-General of South Africa) must indeed be worth listening to <sup>2</sup>

The functions allotted to the House cannot also be considered unsatisfactory, as they are more or less the functions envisaged for an ideal second chamber for Britain by an authoritative conference presided over by Lord Bryce (1918).

(i) The examination and revision of bills brought from the House of Commons, a function which has become more needed since, on many occasions during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate

(ii) The initiation of bills dealing with subjects of a practically non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it

(iii) The interposition of as much delay (and no more) in the passing of a bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be especially needed as regards bills which affect the fundamentals of the constitution or introduce new principles

<sup>1</sup> Ogg, op cit p 196

<sup>2</sup> See W B Munro, *The Governments of Europe*, p 153

## §7] IS THE HOUSE OF LORDS SATISFACTORY?

of legislation, or raise issues whereon the opinion of the country may appear to be almost equally divided

(iv) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an assembly whose debates and divisions do not involve the fate of the executive Government.

According to W B Munro,<sup>1</sup> the House appears to be doing its work fairly well on the whole.

'It examines and revises non-financial measures. It insists, when the occasion arises, that ample time be given for a full public discussion of such bills before they become part of the law of the land. It compels sober second thought and gives opportunity for passions to subside.'

Further, it is an admirable arena for the discussion of many important public questions, especially those which lie, or ought to lie, outside the domain of party politics, its discussions, as we have noted, often reach a high level. Above all, it has ceased to be a rival or an obstruction to the will of the elected House.

What, then, explains the dissatisfaction with the House of Lords which we find in political discussions? The reasons are really twofold. First, a predominantly hereditary body is an indefensible anachronism in a democratic State, it symbolizes privileges not justifiable on a rational basis. The idea of a hereditary legislator is, it is said, as absurd as the idea of a hereditary poet laureate or a hereditary mathematician. There has also been a serious suspicion that peerages have been bestowed not in recognition of merit or service to the community, but as a reward for contributions to party funds, that they have been practically sold for cash. The matter was so serious that it had to be investigated by a royal commission in 1922. Second, there is no doubt that the general attitude of the House of Lords has been conservative, it appears to the public mind as the guardian of vested interests and a brake on progressive legislation. The classic instance of this attitude was the pronounced opposition of the Lords to the extension of the suffrage in 1832, it was overcome only by a threat from the Crown that a number of peers sufficient to swamp the opposition would be created. That is

<sup>1</sup> op cit, pp 151-2

why H. J. Laski declares,<sup>1</sup> that if there is to be a second chamber at all in a democratic State, the House of Lords, *when a conservative government is in office*, is perhaps as good a second chamber as there is in the world

This dissatisfaction has led to various proposals<sup>2</sup> for the reform of the House on more democratic and progressive lines. It is impossible to discuss them in this brief survey, it is sufficient to say that several of them contemplate a reduction in the number of hereditary peers, and the addition of an elected element for the purpose of obviating the most common reproach, viz that it 'represents nobody but itself, and it enjoys the full confidence of its constituents'. This, in its turn, raises other difficulties, e.g. that such a reformed House of Lords, more representative and possessing more talents, may demand greater powers and come into conflict with the House of Commons. There is considerable truth in the remark<sup>3</sup> that the strength of the present House of Lords, paradoxical as it may seem, arises from its weakness, that the case for its abolition loses its force because the Lords are too weak to oppose the will of the popular House. But the position will be altered with a reformed House claiming increased powers. Whatever the future of the House of Lords may be, even as it is constituted and functions at present it is not without its uses. Says Bagehot<sup>4</sup>

With a perfect lower House it is certain that an upper House would be scarcely of any value. If we had an ideal House of Commons, perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. But though beside an ideal House of Commons the Lords will be unnecessary, and therefore pernicious, beside the actual House a revising and leisured Legislature is extremely useful, if not quite necessary.

## §8 THE HOUSE OF COMMONS

The House of Commons, the lower House, is an elected body consisting of 615 members, the basis of representation being on the average one member for every 70,000 of the population. The

<sup>1</sup> *Parliamentary Government in England*, p. 114, italics ours

<sup>2</sup> See Marriott, *Second Chambers*, ch. XIII, for a convenient summary of these proposals

<sup>3</sup> Munro, *op cit*, p. 151

<sup>4</sup> *The English Constitution*, ch. IV

members are, for the most part, elected by single-member constituencies, i.e. by all constituencies (except twelve) returning one member each, and in no constituency are more than two returned. The right to vote is given to all men and women of 21 years and above, not subject to legal incapacity, who have resided in a constituency for three months. An additional vote is given to those electors who are holders of a university degree, or who occupy land or other premises of an annual rental value of £10, for purposes of business, trade, or a profession. No one has more than two votes. Peers, aliens, lunatics, idiots, persons convicted of treason or felony, and persons under age have no vote.

The House is elected for five years, but may be dissolved earlier by the Crown.

The powers of the House may be discussed under five heads —

(i) *Legislative* In theory, the power of the Commons to pass laws for the United Kingdom, the colonies (barring the Dominions) and India is almost unlimited. The checks on this power provided by the constitution are the veto power of the Crown, and the suspensive veto of the Lords according to the terms of the Parliament Act of 1911. The former, according to the custom of the constitution, is not used, the latter is ineffective. Further, the Judiciary has no power in Britain to declare the laws passed by Parliament unconstitutional.<sup>1</sup> Though in theory its power to pass laws is thus great, in practice the cabinet, as is explained elsewhere,<sup>2</sup> has a large measure of influence in guiding legislation, so that, in practice, we may say that 'new laws are made by the ministry with the acquiescence of the majority and the vehement dissent of the minority in the House of Commons'.

(ii) *Control of the Executive* In theory, the Commons can dismiss the virtual Executive, i.e. the cabinet. For the cabinet is, as we have seen, a committee of the Legislature, and the Commons can virtually force it to resign, ultimately by the refusal of supply. In practice, however, as is argued later,<sup>3</sup> the cabinet is scarcely ever turned out of office by the Commons, whatever it does.<sup>4</sup> But through debates on matters of general

<sup>1</sup> See below, §12

<sup>2</sup> See below, §9

<sup>3</sup> See below, §9

<sup>4</sup> Low, op cit, p. 81



policy, questions, and in committee, the executive policy is criticized by members of the House.

(iii) *Control of finance.* As the guardian of national finance, the House has to determine the sources from which, and the conditions under which, the national revenues shall be raised, to grant the money for expenditure; to criticize the manner in which the funds are spent, and to see that the accounts of the spending authorities are properly scrutinized and audited. These powers of the House are secured through certain rules and practices—no taxes may be imposed without the consent of the House, no public money may be spent without similar authority, ministers are constantly subject to interrogation on the floor of Parliament concerning the spending of public money, and the accounts are audited by a committee of the House, viz the Committee on Public Accounts. The method of financial control is treated at length elsewhere,<sup>1</sup> it will be shown that the cabinet has in practice a predominant voice in settling the details of finance.

(iv) *The ventilation of grievances.* It is a function of the House to call attention to abuses and to demand the redress of public grievances. This is done through the practice of asking questions and through general debates.

(v) *Selective function.* The House is a place where men are tested for practical statesmanship. It is a training ground for public men where 'they have the opportunity of showing their mettle, and displaying those qualities of mind and character, which distinguish the sheep from the shepherd, and the rulers from the ruled.'<sup>2</sup> The knowledge that those who show marked ability in the debates of the House have a reasonable chance of being chosen for the cabinet acts as a spur to good work on the part of members. This statement is subject to one important qualification, that under modern conditions of parliamentary life the private member has steadily decreasing opportunities for useful work and 'for showing his mettle', the autocracy of the cabinet is an inhibition. Further, in modern days, a man may well make his mark in public life outside the House and so qualify himself for responsible work.

These are the fivefold functions which the House of Commons is expected to perform—to make law, to control the Executive,

<sup>1</sup> See below, §11

<sup>2</sup> *Ibid.*, op. cit., p. 95

## §9] RELATION OF CABINET TO COMMONS

to be the guardian of the national finances, to ventilate grievances and indirectly to help sift the abler members from the less able. In practice, the initiative in law-making and in finance and the responsibility for both have definitely shifted to the cabinet, and the control exercised over that cabinet is in normal circumstances a myth. Therefore, the functions effectively performed by the House in practice are to secure a Government which enjoys its confidence and to maintain it in power, to criticize that Government when things go wrong, and compel it to satisfy public opinion in the way it does things, and, finally, to ventilate grievances. The growing complexity of modern government prevents the House from doing anything else.

*fringe*  
*subject matter, once all in force the control of Govt. with the confidence of the House is broken, Govt. can satisfy public opinion in way it does things.*

## §9 RELATION OF THE CABINET TO THE COMMONS

The cabinet in Britain is a parliamentary Executive, consisting of members chosen from the Legislature, and dependent for the continuance of its term of office on the confidence of the House of Commons. But, in practice, the parliamentary system has made the cabinet of the day autocratic, for the following reasons

(i) *The legislative initiative of the cabinet* The cabinet drafts its measures and submits them to the Legislature. While it is true that private members of Parliament also have the right of introducing bills, facts<sup>1</sup> show that about 85% of the statutes passed are introduced by the Government. So in the preparation of most bills which become law, the cabinet has influence.

(ii) *Rules of procedure.* The rules of procedure for conducting the business of the House of Commons favour the cabinet at the expense of the private members of the House. For one thing, nearly seven-eighths of the time of the House is given over to Government business<sup>2</sup>. The Government has other advantages too, under Standing Order 1 (8), the session for the day can be lengthened to enable the Government's business to go on, sometimes (as in 1928-9 and 1931-2), the House resolves after debate on a motion proposed by a minister to take the whole or some part of the private members' time. Again, Standing Order 47 (4) says that in all but one of the committees, Government bills shall have precedence.

<sup>1</sup> In the years 1931-5, 219 bills were passed, of these 183 were Government bills and 36 private members'.

<sup>2</sup> See *Standing Orders of the House of Commons*, Part I, Public Business, No 3.

(iii) *The working of the party system and the cabinet's power of dissolution* Members of the House are grouped together in parties, the members being generally expected to vote with their party. The cabinet is chosen from the party having a majority in the House. The members of the majority party are interested in supporting the cabinet generally, not only because some may expect favours at the hands of the Government, but because the *risk* and *cost* attending a defeat of the Government are great. For, if the cabinet is defeated in the Commons, it can, instead of resigning, advise the king to dissolve the House, and a general election must be held. As Bagehot<sup>1</sup> acutely pointed out, the cabinet is a creature, but, unlike other creatures, it has the power of destroying its creators. This makes an important difference. 'A member of Parliament, however insignificant,' says Ivor Jennings,<sup>2</sup> 'likes his seat, or he would not be there.' A dissolution is distasteful to him, because he has to pay a substantial sum to secure re-election, perhaps as much as £1,000. 'He has to spend an unpleasant fortnight or three weeks. Above all, he may have little certainty of being re-elected.' Further, in addition to personal discomfiture, his opposition to his Government majority may after all be helping the Opposition, which he detests more, to come to power. It is therefore rarely that a Government supporter votes against the Government. The last majority Government to be ejected by a vote of the House was the Liberal Government of 1895.<sup>3</sup>

(iv) *Financial control* In matters of finance the dominance of the cabinet is practically complete. The province of private members is, as we shall see later,<sup>4</sup> limited to proposals for the reduction of expenditure proposed by the cabinet. Their criticism is ineffective, and proposals for reduction are rarely carried.

(v) *Increased State intervention* Another factor, which has contributed to cabinet domination, is the reliance all round upon State assistance and State regulation, with their necessary corollary, planning.<sup>5</sup> Instead of being the body to resist the demands of the Crown for supplies until grievances have been redressed, the Commons today press for the redress of grievances by State subsidies. The result is that legislation of this character is

<sup>1</sup> *The English Constitution*, ch. 1

<sup>2</sup> *Parliament*, p. 122

<sup>3</sup> *ibid.*, p. 120

<sup>4</sup> See below, §10

<sup>5</sup> E. C. S. Wade, in his introduction to Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed.), p. cxx.

necessarily complex, and cannot readily be amended in vital particulars, even if the Commons wished to do so, without wrecking the policy which it seeks to translate into laws

(vi) *Other reasons* The conditions of parliamentary life are not calculated to enable the Commons to control the cabinet effectively Lord Rosebery has pointed out that the theoretical accountability of the cabinet is normally and regularly in abeyance for half the year 'During the whole of the parliamentary recess, we have not the slightest idea of what our rulers are doing, or planning, or negotiating, except in so far as light is afforded by the independent investigations of the press'<sup>1</sup> It is difficult, moreover, for a body of men who pay fitful attention to public affairs to supervise other men who have in their hands the conduct of these affairs all the time

'The members of the House of Commons', says Sidney Low,<sup>2</sup> 'are occupied in various ways, they have many things to interest them during the short London season, and though they may have every desire to do their political work properly, the circumstances are much against them Half the House is taken up with business, and the other half with amusement As the session goes on, and the weather grows warmer, and London society plunges into its summer rush of brief excitement, many members find it difficult to devote their energies steadily to their "parliamentary duties"'

In recent times, the assumption of office by national Governments has also reduced the effectiveness of the Opposition, for it assumes that party and national interests are identical This tends to put the Opposition in the false position of being regarded as anti-national, if they oppose

That the parliamentary system tends to make the cabinet autocratic is a fact, it is, however, 'an autocracy exerted with the utmost publicity, under a constant fire of criticism, and tempered by the force of public opinion, the risk of a want of confidence, and the prospects of the next election'<sup>3</sup> The cabinet has its finger always on the pulse of the House of Commons, and especially of its own majority there, it is ever on the watch for expressions of public feeling outside

<sup>1</sup> Rosebery, cited by Low, in *The Governance of England*, p. 83

<sup>2</sup> *ibid*

<sup>3</sup> A. L. Lowell, *The Government of England*, Vol. I, p. 355

## §10 THE PROCESS OF LAW-MAKING

Bills may be introduced in Parliament by ministers or by private members. The former are called Government bills; the latter, private members' bills. Again, bills may be either public or private. A public bill is one which affects the general interest and concerns the whole people, or at any rate a large section of them, e.g. the Compulsory Education Bill<sup>1</sup>. A private bill (which is not the same as a private member's bill) is one whose object is 'to alter the law relating to some particular locality, or to confer rights on or relieve from liability some particular person or body of persons', e.g. one authorizing the compulsory purchase of land by a railway company, or authorizing a municipality to construct tram-lines within the municipality.

The main stages in the passing of a public bill into law are:

(i) *First reading*. The bill is presented, and its title read aloud by the clerk at the table of the House. Normally, no opposition is made, the bill is deemed to have been read a first time, and is printed.

(ii) *Second reading*. The member in charge of the bill moves 'that the bill be now read a second time'. At this stage, there is a discussion on the principles of the bill, if a member strays into its details, the Speaker of the House (i.e. the presiding officer) has power to pull him up.

(iii) *Committee stage*. If the principles of the bill are approved by the House at the second reading, it is referred to one or other of the committees (as explained below) for detailed discussion, amendment and report.

(iv) *The report stage*. The report of the committee, embodying the suggestions of the committee to improve the bill, is presented, and any member may move amendments<sup>2</sup>.

(v) *Third reading*. On third reading only verbal amendments may be made. The bill is passed or rejected.

(vi) *Consideration by the House of Lords*. If the bill is passed, it is sent up to the House of Lords, where it passes through more or less similar stages<sup>3</sup>.

(vii) Finally, the bill is presented to the king for his assent. This assent may be given by him in person, or he may issue a

<sup>1</sup> Money bills are also public bills, they are considered separately in §11.

<sup>2</sup> Subject to the Standing Orders of the House.

<sup>3</sup> Also see above, §6.

commission authorizing certain commissioners to 'declare and notify his royal assent' on his behalf. The latter is now the normal practice and is but a picturesque formality.<sup>1</sup>

Private bills follow a procedure in some respects different from that used for public bills. First, a petition, with the bill attached to it, must be presented. An official known as 'the examiner of petitions for private bills' goes through the bill to see whether certain formalities in connexion with such bills have been observed by its promoters, e.g. they must notify their intention to promote the bill by newspaper advertisements and gazette notices, and give individual notices to owners, lessees, occupiers of lands and houses, or others affected by the bill, so that the affected parties may have an opportunity to petition against the bill or any part of it. If the necessary conditions are not satisfied, a reference may be made to the Committee on Standing Orders to say whether the non-compliance may be overlooked. If the examiner's report is favourable, the bill is presented, and it is read a first and a second time. If there is no opposition at this stage, it is referred to a committee on unopposed bills; if there is opposition, it goes to a private bill committee, normally of four members, in which the procedure is quasi-judicial, with counsel and witnesses to be heard. Then the bill follows the usual course followed by public bills.

### *The committee system*

There are in the House of Commons five kinds of committees: sessional committees, standing committees, select committees, committees of the whole House, and private bill committees.

The sessional committees are chosen by the House for an entire session, each for specific work, e.g. the committee of selection (to select members to the standing committees and the private bill committees), the committee on Standing Orders, and the committee on public accounts.

The standing committees are five in number. Four of these are designated A, B, C, and D committees, each normally consisting of from 30 to 50 members nominated by the committee of selection and, as far as possible, reflecting in its composition the strength of parties in the House. The chairmen of committees are chosen by a 'chairman's panel for standing committees'.

<sup>1</sup> See C. Ilbert, *Parliament*, pp. 75-6.

named by the committee of selection. They are not committees for any definite subjects or branches of legislation but may consider any public bill referred to them by the Speaker. The fifth committee considers all public bills relating exclusively to Scotland and consists of all the members in the House representing Scottish constituencies, together with not less than ten or more than fifteen other members nominated by the committee of selection for the purpose of any particular bill.

The select committees are appointed from time to time to investigate and report upon specific subjects on which legislation is pending or contemplated. As a rule, they consist of fifteen members, each chosen by the House on the motion of a member. It is provided,<sup>1</sup> however, that 'every member intending to move for the appointment of a select committee shall endeavour to ascertain previously whether each member proposed to be named by him on such committee will give his attendance thereupon'. Each committee chooses its chairman. The committee has power to send for persons, papers, and records.<sup>2</sup> It ceases to exist as soon as its work is done.

*Committees of the whole House* differ from *the House* in the following respects. The Speaker leaves the chair and his place is taken by a chairman who is appointed in each new Parliament; the mace is placed under the Table to indicate that the House, as a House, has adjourned, and the rules of procedure are less rigid than in the House. Money bills are not referred to standing committees but only to committees of the whole House.

Private bill committees consist of four members each, chosen by the committee of selection, the procedure in these committees, as already indicated, is quasi-judicial.

## §11 CONTROL OF THE HOUSE OVER FINANCE

In a previous section it has been noticed that the House of Commons has a fourfold function in respect of finance, viz. to determine the taxes, to make appropriations, to scrutinize accounts and to criticize the manner in which the national funds are spent. It remains to consider how the House performs these functions.

The function of the House in respect of finance begins only after the budget is presented to it by the Government sometime

<sup>1</sup> Standing Order (Public Business) 53

<sup>2</sup> *ibid.*, 61

## §11] CONTROL OF THE HOUSE OVER FINANCE

towards the end of February or early in March. It must, however, be remembered that the preparation of the budget involves much time and work for the Government. The budget is prepared by the Treasury (with the Chancellor of the Exchequer as its head) in consultation with, and on the basis of estimates supplied by, the various departments of government, and discussed in the cabinet before it is presented. On presentation, the House resolves itself into a committee of the whole House 'in supply' (the Committee of Supply) to discuss the estimates of expenditure,<sup>1</sup> and into a committee of the whole House 'in ways and means' (the Committee of Ways and Means) to discuss proposals for raising funds. The resolutions of the Committees of Supply and of Ways and Means are reported to the House, and on the basis of these resolutions, the Appropriation Act and the Finance Act are passed by the House authorizing expenditure and taxation respectively. Every payment of money has further to be authorized by the Comptroller and Auditor-General, an officer holding office on good behaviour, and removable by the Crown on an address from both Houses of Parliament. Finally a committee of the House, called the Committee on Public Accounts, scrutinizes the annual accounts and makes a report to the House, in order that its work may be effective; this committee is usually presided over by a leading member of the Opposition. Question time in the House and debates also provide opportunities for private members to criticize the manner in which the money is spent.

Properly to grasp the nature of the financial control exercised by the House, two or three things have to be added.

First, as normally the Appropriation Act is passed only about the end of July (although the financial year begins on 1 April), the necessary permission for expenditure during these four months is granted by 'votes on account'.<sup>2</sup>

Secondly, some items of expenditure, such as the interest on the national debt, the royal civil list, and the salaries of judges, do not require an annual vote of Parliament, but are said to be

<sup>1</sup> Since 1921 an Estimates Committee, now of 28 members, has also been appointed annually 'to examine such of the Estimates presented to this House as may seem fit to the Committee, and to suggest the form in which the Estimates shall be presented for examination, and to report what if any, economies consistent with the policy implied in those Estimates may be effected therein'.

<sup>2</sup> There are some exceptions to this, see Jennings, *Parliament*, p. 313.



charged on the Consolidated Fund, i.e. the fund to the account of the Government in the Bank of England.

Thirdly, it is a well-established principle that the House does not make appropriations save at the request of the Crown. As E. May puts it.<sup>1</sup> 'The Crown demands money, the Commons do grant it, and the Lords assent to the grant but the Commons do not vote money unless it be required by the Crown', i.e. the proposal for the expenditure of public money must come from a minister of the Crown. Private members only have the right to propose a reduction; they can neither propose a new item, nor suggest an increase in an existing item.

This rule is laid down by a Standing Order of the House.<sup>2</sup> By the practice of the House, a similar principle also applies to the imposition of taxes.

'The principle', says May, 'that the sanction of the Crown must be given to every grant of money drawn from the public revenue applies equally to the taxation levied to provide that revenue. No motion can therefore be made to impose a tax save by a minister of the Crown, unless such tax be in substitution, by way of equivalent, for taxation at that moment submitted to the consideration of Parliament, nor can the amount of a tax proposed on behalf of the Crown be augmented, nor any alteration made in the area of imposition. In like manner, no increase can be considered either of an existing, or of a new or temporary tax for the service of the year, except on the initiative of a minister, acting on behalf of the Crown.'<sup>3</sup>

From the foregoing account, it will be seen that the House controls *the raising of funds* through the discussion in the Committee of Ways and Means and the Finance Act; and the *appropriation of money* through the discussion in the Committee of Supply, the Appropriation Act, and the authorization by the Comptroller and Auditor-General, an officer responsible to Parliament. Its *scrutiny of accounts* is done through the Committee on Public Accounts. It *criticizes the manner in which the money is spent* through questions and in debates.

The British financial procedure has some merits: it guarantees a financial programme which has been prepared as a unit and for which full responsibility is taken by one authority, the cabinet. The rule that proposals for taxation and expendi-

<sup>1</sup> *Parliamentary Practice* (13th ed.), p. 446.

<sup>2</sup> (Public Business), 63.

<sup>3</sup> May, op. cit., p. 511.

ture must originate from the Crown is a healthy one in so far as it prevents the undue influence of localism in appropriations. The fact that proposals for income and expenditure are considered by the same body of persons, though sitting under two different names, helps to relate income to expenditure. Finally, ministers have the opportunity to defend their proposals on the floor of the House.

It must, however, be admitted that the control of the House is on the whole ineffective. The committees of the whole House are too large, and have too little time, to discuss the estimates effectively, the details of the budget are not often intelligible to the average member. Party solidarity, moreover, coupled with the cabinet's power to dissolve the House or its threat to regard as a vote of no-confidence any attempt by the House to reduce the budget, render the power of the Commons illusory. Finally, the indifference of the average member to financial questions makes its control a farce.

'Who is not familiar', asks Sidney Low, 'with the farce of a debate on the Army or the Navy in committee?'. The bulk of the House—busy, fatigued, bored and idle—is out at dinner, or on the terrace, or in the smoking-room, its members will come and vote if required, but otherwise will know no more of the debate than the newspaper-readers who will glance languidly the next morning over the array of unintelligible figures and obscure technicalities.<sup>1</sup>

The fact is, as Lowell puts it,<sup>2</sup> in matters of finance as in legislation, the English system approximates more and more to a condition where the cabinet initiates everything, frames its own policy, submits that policy to a searching criticism in the House, and adopts such suggestions as it deems best, but where the House, after all this has been done, must accept the acts and proposals of the Government as they stand or pass a vote of censure, and take the chance of a change of ministry or a dissolution.

## §12 THE JUDICIARY ✓

The judicial system of Britain comprises the following courts for criminal cases, the justices of the peace, and magistrates, quarter sessions, assizes, the court of criminal appeal, and

<sup>1</sup> *The Governance of England*, p. 91

<sup>2</sup> A. L. Lowell, *The Government of England*, Vol. I, p. 327

the House of Lords, for civil cases, county courts, the High Court, the Court of Appeal, and the House of Lords.

Judges are appointed by the Crown; they hold office during good behaviour, those of the highest courts being removable by the Crown only on an address presented by both Houses of Parliament. Their salaries cannot be reduced during their term of office. These provisions are meant to secure the independence of the Judiciary from the Executive.

### *Relation to the Legislature*

Judges in Britain, unlike the U S A, cannot entertain any question as to the competence of the Legislature to enact a given law. Supposing Parliament passes a law that Englishmen may be imprisoned without trial, a judge may dislike it, and even consider it as being against the spirit of the constitution, but he has no right to question its validity or declare it unconstitutional.

On the other hand, the Legislature can, by an amendment of the law, virtually override the decision of the courts. For instance, Parliament enacted the Trade Disputes Act in 1906 because it did not like the judicial decision in the Taff Vale case (1901). That decision was that the Trade Union as a body was bound to suffer for the mistakes of the officers of the union in the conduct of a strike. Parliament thought that such a decision would be a hindrance to the healthy growth of the Trade Union movement, which they considered necessary for social progress. So they passed the Trade Disputes Act, according to which the Trade Union was declared not responsible for the mistakes of its officers.

### *Relation to the Executive*

Judges of all ranks are appointed by the Executive, but those of the highest courts are not liable to be removed except by the special procedure indicated earlier on this page. Judges of the lower ranks do not enjoy the same immunity by law, but they do in practice.

All officials are subject to the jurisdiction of the ordinary courts<sup>1</sup> for acts done in their official character. This implies the right of the subject, however humble, to seek redress for in-

<sup>1</sup> See below, however, pp. 271-2

jury in the ordinary courts This right forms part of the principle known as 'the rule of law'

### §13 THE RULE OF LAW ✓

According to Dicey, who was the first to give it a clear analysis,<sup>1</sup> 'the rule of law' means three things

(i) No man is punishable, or can be lawfully made to suffer in body or goods, except for a distinct breach of law, established in the ordinary legal manner before the ordinary courts of the land It means the supremacy or predominance of regular law, as opposed to the influence of arbitrary power

(ii) No man is above the ordinary law, i.e. there is one law for all In this sense 'the rule of law' excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens, or from the jurisdiction of the ordinary tribunals This is in contrast to the system of administrative law prevailing in France and other European countries The idea there is that disputes involving the Government or its servants are beyond the sphere of the ordinary courts and must be dealt with by special and more or less official bodies

'With us', says Dicey,<sup>2</sup> 'every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen The *Reports* abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority'

One instance may be cited In 1763, Wilkes, the editor of a paper called *The North Briton*, criticized the king's speech of the year as 'the most abandoned instance of ministerial effrontery ever attempted to be imposed upon mankind' Lord Halifax, the Secretary of State, issued a *general warrant* for the apprehension of the authors, printers and publishers of *The North Briton* together with their papers, the execution of which was personally superintended by Wood, the Under-Secretary Under this warrant forty-nine persons were arrested including the editor, Wilkes, and the printer, named Leach, but including also many perfectly innocent persons Wilkes brought an action against Lord Hal-

<sup>1</sup> *Law of the Constitution*, Part II

<sup>2</sup> *ibid*, p. 193

fax and Mr Wood and was awarded £4,000 damages from the former, and £800 from the latter, it was decided that general warrants were illegal.

The importance of this, the distinctive aspect of the rule of law, cannot be exaggerated. As Maitland points out,<sup>1</sup> it ensures ministerial responsibility in the legal sense. Strictly speaking, ministers are not responsible to Parliament, neither House, nor the two Houses together, has any legal power to dismiss one of the king's ministers. But in all strictness the ministers are responsible before the courts of law, and before the ordinary courts of law. They can be sued or prosecuted there even for the highest acts of State.

(iii) The general principles of the constitution, e.g. the right to personal liberty, the right of public meeting and freedom from trespass, are in England the result of judicial decisions determining the rights of private persons in particular cases brought before the courts, whereas in other countries they are laid down, and seem to have their source, in a written constitution. For instance, the freedom from arrest by a *general* warrant has always been inherent in the common law of the land; it was but established by the decision in Wilkes' case. But in other countries, such fundamental rights are included as part of a constitutional declaration of rights. This is defective, according to Dicey, because the idea readily occurs that the rights are capable of being suspended or taken away, but where, as in England, the rights of individuals are thought to be inherent in the law of the land, it is felt that they cannot be taken away without a revolution in the habits of the people.

### *Limitations to 'the rule of law'*

It is now agreed on all hands<sup>2</sup> that Dicey's analysis is defective; in particular, it tended unduly to exaggerate the merits of 'the rule of law'. It is now seen that the rule of law, as it prevails in Britain, is subject to two limitations.

(i) The Crown cannot be made liable in tort<sup>3</sup>. The government officer, it is true, is liable in his personal capacity for his

<sup>1</sup> *The Constitutional History of England*, p. 484.

<sup>2</sup> Wade, *op cit*, pp. lxxv-lxxv, Jennings, *The Law and the Constitution*, ch. II, W. A. Robson, *Justice and Administrative Law*.

<sup>3</sup> Tort means the breach of a duty imposed by law whereby some person acquires a right of action for damages.

official mistakes, but since the Crown itself cannot be compelled to assume responsibility—on the ground that ‘the king can do no wrong’—the successful plaintiff may be left without substantial relief *Bainbridge v the Postmaster-General* (1906) is an instance in point ‘The van of the Postmaster-General may run over Miss Bainbridge, but the irresponsibility of the State deprives her of any right to compensation except from the humble wages of the driver’<sup>1</sup>

(ii) With the extension of governmental activities into new fields such as education, public health, town-planning, the protection of the unemployed, etc., it has become common to entrust to executive authorities judicial duties which, if the rule of law prevailed without exception, would be entrusted to the ordinary courts. Thus the Roads Act, 1920, gives to the Minister of Transport power to decide appeals from the refusal of licences to run omnibuses. The Board of Education decides appeals about the opening of new schools. An appeal against an order of a County Council lies not to the courts but to the Minister of Health. Similarly, the District Auditor, the National Health Insurance Tribunals, the Unemployment Insurance Tribunals, and the Board of Trade exercise some judicial or quasi-judicial duties. This is a kind of administrative law, the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies<sup>2</sup>

The primary reason<sup>3</sup> for the growth of such administrative law is the extension of social legislation in the interests of the health, safety and general welfare of the community as a whole (public health, education, housing, etc.) For this necessitates a technique of adjudication better fitted to respond to the social requirements of the time than the elaborate and costly system of enforcement provided by litigation in the courts of law. In practically every field to which public administration has extended, new standards have had to be set up and maintained, e.g. the standard of a house reasonably fit for human occupation, the standard of capacity for work from the unemployed, etc. As W. A. Robson says, for the task of hammering out new standards in fields such as these, the courts of law would doubtless have been among the first to acknowledge their own manifest unsuitability.

<sup>1</sup> Laski, *A Grammar of Politics*, p. 395

<sup>2</sup> Robson, *op cit*, ch. I

<sup>3</sup> *ibid*, ch. VI

Expert knowledge is necessary, and this can be provided by administrative courts. For instance, an Unemployment Insurance Tribunal can be manned by representatives of workers and of employers. Further, the mere volume of work involved by certain kinds of social legislation would have imposed an intolerable strain on the ordinary courts. Finally, there has also been a desire to provide a system of adjudication at once cheap and rapid.

While administrative law, as developed in Britain, does have these advantages, its working, according to competent observers, has also revealed some defects. These are summarized by Lord Hewart<sup>1</sup> in one phrase, 'administrative lawlessness'. Comparing the position in Britain with that in France, he points out that administrative law in that country, though different from ordinary law, is still law, i.e. it satisfies the requirements of a truly judicial procedure: publicity, oral hearing, the taking of evidence, known and impartial judges, and reasoned judgement. In Britain, on the contrary, there is a lack of system, and the essentials of judicial procedure are not always observed. Hence there is a possibility of arbitrariness, with its consequent danger to the liberty of the individual.

#### §14 POLITICAL PARTIES

<sup>revised</sup> The working of government in Britain, it must now be clear, is very largely conditioned by the existence and activity of parties. A political party is an organized group of citizens who hold the same political opinions and who work to get control of the Government in order that the policies in which they are interested may be carried into effect. There are now three such major parties in Britain, the Conservative, the Liberal and the Labour. <sup>part</sup> The origins of the British parties may be traced to the days of Queen Elizabeth (1558-1603). Towards the end of her reign, the Puritans, opposed to the intolerance and the extreme prerogative of the Queen's government, exerted themselves to gain seats in Parliament, where their representatives acted as an organized party in arresting the royal grant of monopolies.<sup>2</sup> Clear party lines arose in the Stuart period (1603-1714).

<sup>dividing</sup> The dividing line was primarily constitutional, i.e. whether arbitrary government by the kings or government limited by

<sup>1</sup> *The New Despotism*, p. 43

<sup>2</sup> S. Leacock, *Elements of Political Science*, pp. 314-15

Parliament was to prevail. Those who supported the former were known as the Cavaliers, those who supported the latter, as the Roundheads. There was also the religious issue. Those who supported the Church of England tended to form themselves into one group, the Nonconformists, into another. In general, the king's supporters were good Churchmen, the supporters of Parliament were for the most part Nonconformists. In the reign of Charles II (1660-85) the names *Tory* and *Whig* were applied to these two parties.

The Revolution of 1688 and the Hanoverian succession to the throne in 1714 were a triumph for the principles of the Whig party. There was, therefore, a change in the position of parties, the Whigs now supporting the new dynasty, which admitted the claim of Parliament to have a greater voice in the affairs of the nation, and the Tories being in the opposition.

Later, during the reign of George III, the names Liberals (the Whigs) and Conservatives (Tories) came into use, the former being considered generally in favour of reform, and the latter, generally in favour of the established order.

From the Revolution onwards was gradually established the practice of kings choosing their ministers from the party which commanded a majority in Parliament. This gradual development of the parliamentary system is very important in the history of British parties, for, as A. L. Lowell has shown, that system is based upon party, and by the law of its nature tends to accentuate party.

The last important landmark in the history of British parties is the formation of the Labour Party in the present century. The origin of the party may be traced to 1899 when the Trade Union Congress of the year instructed its parliamentary committee to invite all co-operative, socialistic, Trade Union and allied organizations in England and Wales to unite in calling a special convention to devise ways and means for securing the return of an increased number of Labour members to the next Parliament. The convention met in 1900, out of this arose the Labour Representation Committee, renamed the Labour Party in 1906.

### *Party organization*

The nature of party organization depends on the functions

<sup>1</sup> For the origin of these terms see R. Lodge, *The History of England from the Restoration to the Death of William III* (1660-1702), p. 170.



which parties are called upon to perform These functions are to fight the elections to Parliament, and, since the advent of the Labour Party, also to local bodies ; to raise funds for the purpose ; to distribute party literature ; to choose candidates for elections, and to canvass support for them by arranging meetings, taking voters to the polling booths, etc. , to do what is needful in Parliament (according as a party is in power or in opposition) , and to see that certain policies are accepted and carried out by the Government

To perform these functions, each party has a threefold organization

(i) The local party committee in each parliamentary constituency This works in harmony with the central office and with the Member of Parliament for the district where one is returned from the party

(ii) The parliamentary party This consists of all members of the party who are actually in Parliament, with an elected leader In the Conservative and Liberal parties, the formulation of the policy of the party both in the country and in Parliament is largely left to the parliamentary party Every party maintains a central office, 'with paid officials engaged in research, propaganda, and electioneering', to act as the link with the constituency party organizations The chief whip of the party, in addition to helping to raise funds for it, scrutinizes its parliamentary candidates , and 'as far as possible he must get constituencies to adopt candidates whom the central office suggests to them' <sup>1</sup>

(iii) A national organization The Liberal Party has the National Liberal Federation , the Conservative Party, the National Union of Conservative and Unionist Associations ; and the Labour Party, the Annual Conference In its annual conference, each party draws up its 'platform' and takes stock of its position in the country and devises ways and means to improve it

### Party principles

'There are, perhaps, two main tenets', wrote Edward Marjoribanks,<sup>2</sup> 'the protection of property and the maintenance of the British Empire under the Crown, for which modern English

<sup>1</sup> R. L. Buell (Editor), *Democratic Governments in Europe*, p. 104

<sup>2</sup> *The Life of Lord Carson*, p. 364

Conservatism stands . . . For the Conservative the safe possession of property is, after the protection of life itself, the distinguishing mark of civilized society, and one of the first duties of the State is to ensure it.'

The Conservatives believe that the present social order, resting as it does on private ownership and control of the means of production, 'is organically sound', the defects which exist must be removed, but without affecting the basic structure of society. They do not believe in economic equality. Their belief in the maintenance of the British Empire makes them suggest that the establishment of self-government in India need not be hastened. Further, they believe in tariffs and the protection of home industries. They support the claims of the Established Church, the Crown and the House of Lords. It is natural that the party derives its main support from the Church, and from the wealthy people. The landlord and the commercial and industrial interests are broadly Conservative.

The Labour Party is avowedly socialistic and believes in the public ownership and control of the means of production. A few extremists apart, the party in general believes in evolutionary socialism, i.e. in using the democratic State to attain the goal of socialism and in retaining it after the goal is attained. Socialism, indeed, is the next step in democracy. Gradualness and parliamentary methods—these are the fundamental principles accepted by the bulk of the party. To start with, work, wages, education, leisure, and insurance against unemployment, sickness, and old age must be guaranteed to all, the progressive principle in taxation must be further extended, public utilities and natural monopolies like railways and electricity must be immediately nationalized, and, later, land and all forms of industrial capital. They believe in a progressive policy in regard to self-government in India. In the international sphere, they are inclined to support all proposals calculated to ensure collective security. It need hardly be added that the party derives its main support from the working classes although many 'intellectuals' also support it.

The Liberal Party in general supports a policy of social reform and amelioration, urges economy in national expenditure and a freeing of trade from tariffs. It

'urges State regulation rather than nationalization or State

management, though (like the Labour Party) it wishes the Government to control banks, investments, transport, and electric power, and to regulate the coal industry. Its agricultural policy is to secure a more efficient use of land through the provision of small holdings and allotments. The "Liberal Way" is in essence a middle way between the "State Capitalism" of the Conservatives and the socialism of Labour.<sup>1</sup>

The party draws its strength from the professional and commercial classes, the small independent farmers, about one half of the middle class, and some working men. Since the advent of Labour to prominence, the Liberals have somewhat declined in strength and importance in English politics.

### §15 LOCAL GOVERNMENT IN ENGLAND<sup>2</sup>

The units of local government in England are the parish, the rural district, the borough and the urban district, the county, and the county borough.

The borough is the oldest local government unit in the country, the incorporation of a township by means of a charter from the Crown (which was the manner in which a borough came into existence) was a special and highly valued privilege.

Boroughs are divided into quarter sessions boroughs and non-quarter sessions boroughs, i.e., those which have a court of quarter sessions presided over by a Recorder (a judicial officer appointed by the Crown) and those which have not; the latter are still subject to the jurisdiction of the Justices of the county in which the borough is situated. The small boroughs are perhaps the least efficient of English local government units, but the larger ones have now become county boroughs, i.e., they enjoy all the powers of municipal boroughs and also all the powers of County Councils in addition. A county borough area does not form part of the county in which the borough is situated, and very bitter are the struggles between county borough and county, when by means of a private act of Parliament a county borough seeks to extend its boundaries and annex part of the county area.

The Chairman of the municipal borough is the Mayor, a very ancient and honourable office. In some of the larger cities, he is by prescription known as the Lord Mayor, and the Crown,

<sup>1</sup> Buell, *op cit*, p. 256

<sup>2</sup> I am indebted for a good part of this section to Sir Maurice Gwyer

as the fountain of honour, has of late years directed that in the case of certain of the larger towns, the Mayor should also be so called. All other local authorities have a chairman only.

The county council has 56 to 140 members, the strength varying according to the population of the county, elected on a wide suffrage for three years. The council elects its chairman. Its powers include the alteration of the boundaries of districts and parishes, higher education, the police, reformatories, health and housing, the care of the destitute, the treatment of lunacy, mental deficiency, tuberculosis, smallpox and venereal disease, and the supervision of districts, parishes and boroughs. The executive work is done by officials appointed and controlled by the Council, holding office usually on good behaviour and not dismissible on political grounds.

Urban and rural district councils owe their origin to the Public Health legislation of the early part of Queen Victoria's reign, but have developed greatly in importance since then. Their powers include matters relating to public health, water supply, minor roads, bridges, housing and education. The main executive officers are the clerk, treasurer, engineer, sanitary inspector and medical officer.

Parish councils (and in small parishes parish meetings) date from the Local Government Act of 1894. Their main powers are in regard to the maintenance of the public right of way, the management of parish property, the alteration of boundaries, burial grounds, public libraries and recreation grounds. There are generally two executive officers—a paid clerk and an unpaid treasurer.

The present tendency is to give more and more local government powers to County Councils and County Borough Councils; and this is being carried a step further by Mr Butler's recent Education Act, which has made them the exclusive authorities in educational matters for the whole of the kingdom, though they are authorized to delegate certain of their powers to the larger boroughs and urban districts. There is a good deal of talk in England at the present time of forming even larger units to represent 'regions', and something may perhaps come of it after the war.

*Control by the central Government*

Local self-government does not mean that the local bodies are free from all control by the central Government. That Government has the power to see that a fair standard of administration is maintained. Central control is exercised primarily in two ways :

(i) *Administrative*. The responsibility for a fair standard of efficiency in local government is insisted upon, and secured by such means as the audit of accounts, co-operation and financial assistance in approved schemes, the withholding of grants where unsatisfactory administration is proved, and the insistence on the possession of defined qualifications by certain officers. This control is diffused, i.e. vested in several central departments such as Health, Home, Education, Transport, and Trade, and not concentrated in one department. In general the control is exercised by co-operation, advice and warning rather than by disciplinary action.

(ii) *Judicial*. The responsibility of the public official to law, implied in 'the rule of law', applies to local government as well.

The main principles of English local government may be summarized thus. It is democratic, as may be seen from the existence of representative councils, elected chairmen, and a wide suffrage. The system is a co-ordinated whole, the authority of the larger body over the smaller being definitely recognized. It is decentralized, local bodies being given the maximum amount of independence by the central authority, consistent with the maintenance of a fair standard of administration, the initiative, within defined limits, in policy-making and in the spending of money resting with them. Finally, there is a tradition of honest and efficient local administration.

## §16 CONVENTIONS OF THE CONSTITUTION

At the beginning of this chapter, reference was made to the fact that the 'constitution' of Britain consists partly of laws, and partly of conventions or usages. These latter need some elaboration as there are two broad differences between laws and conventions.

(i) Laws are enforceable through a court of law; conven-

<sup>1</sup> See J. A. R. Marriott, *The Mechanism of the Modern State*, Vol II, pp. 376ff. Marriott also mentions legislative control, this, of course, is common to every other kind of body and person in the whole country.

tions are not There is no formal method of determining when conventions are broken 'and to set in motion the train of consequences, which this breach should bring.' Thus if a voter is denied the privilege of voting, he can enforce his right through a court of law But if the king chooses to exercise his veto over laws and thus break a long-established usage, a law court cannot question him

(ii) Laws are more or less precisely formulated, it is usually nobody's business to formulate conventions, with the result that, at any particular time, differences of opinion may arise about a convention which is said to be 'established' Thus ever since Stanley Baldwin was summoned to form the ministry in 1923, it has been, according to many, a convention that the Prime Minister must be a member of the House of Commons, but one cannot say that this is yet 'established' if the king sends for a leading member of the House of Lords to form a ministry there may be a substantial body of opinion to support him

The following are some of the most important conventions of the constitution —

The king does not veto a bill passed by Parliament The Crown can create a sufficient number of new peers to overcome the opposition of the House of Lords

The party, which for the time being commands a majority in the House of Commons, has a right in general to have its leaders placed in office The most influential of these leaders ought to be the Premier Ministers are collectively responsible to Parliament They resign office when they have ceased to command the confidence of the Commons A cabinet may appeal to the country once by means of a dissolution

When the House of Lords acts as a court of appeal, no peer who is not a law-lord takes part in the discussions of the House

Parliament should be summoned at least once a year. A bill must be read three times in the House of Commons before it is sent up to the other House

An officer of the Crown is tried in the same court as an ordinary citizen

The Prime Minister of a Dominion advises the king direct as to the choice of the Crown's representative in that Dominion. The Governments of the Commonwealth consult one another in deciding on their foreign policy

The sanction behind the conventions is threefold. (i) Public opinion If, for instance, a cabinet, which clearly does not command the confidence of Parliament, remains in office, public opinion condemns its action, and practically compels it to submit its resignation. (ii) The desire of the governing class to carry on the traditions of constitutional government and 'to keep the intricate machinery of the ship of State in working order'. (iii) Indirectly the breach of some conventions may bring the offender into conflict with the courts and the law of the land. This is true particularly of those usages which regulate the relations between the cabinet and the House of Commons. Thus if Parliament were not summoned every year, the Finance Act would lapse; the Government, in order to carry on the administration, would have to ask for taxes, which the citizen would legally be at liberty to refuse to pay. He might sue the officer responsible in a court of law.

### *Value of conventions*

Conventions play an important part in the working of the constitution. In the classic words of Dicey, many of them 'are rules for determining the *mode* in which the discretionary powers of the Crown ought to be exercised'. The discretionary powers of the Crown are those powers for which it need not get specific parliamentary sanction, they are to be used in such a way as ultimately to give effect to the will of that power which is the true political sovereign, viz the electorate. Thus the king, in exercising his power to appoint ministers, asks the leader of that party which commands a majority in the House to advise him in the matter. He can dissolve Parliament even before its legal term is over, he exercises this power in order to test whether the House is truly representative of the electorate, and so on.

Further, they enable the constitution to bend without breaking, to adjust itself to changing needs without a complete overhauling. Thus the convention that the king does not veto the laws is an adjustment of monarchy to the needs of a democratic age, kingship is retained without prejudice to the supremacy of the popular will.

And, lastly, they help the constitution to work smoothly. The usages regarding the cabinet system help the Legislature and the Administration to work in unison; those regarding the

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relations of Britain with the Dominions help to retain the Dominions in the Commonwealth without loss to their self-respect

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## CHAPTER XVII

# THE FRENCH REPUBLIC<sup>1</sup>

### §1 INTRODUCTORY

France, like Britain, is a unitary State. The constitution is technically a rigid one requiring, as it does, a procedure for its amendment different from the one adopted for passing ordinary laws. The procedure for amendment<sup>2</sup> is, however, exceedingly simple :

‘The chambers shall have the right, by separate resolutions taken in each by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic, to declare a revision of the constitutional laws necessary. After each of the two chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision. The acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly’

The National Assembly is required to meet at Versailles. The absolute majority (mentioned above) has been interpreted to mean half plus one of the legal number of members without deducting vacancies caused by resignation, death or otherwise. It will be seen that the right of each chamber to declare a revision of the constitution necessary amounts to a veto on any constitutional amendment that may be desired by the other.

Can the National Assembly make *any* amendment to the constitution? A constitutional law of 1884 declared that ‘the republican form of government shall not be made the subject of

<sup>1</sup> The constitution of France outlined in the present chapter is that of the French Republic established by the constitutional laws of 24 February, 25 February, and 16 July, 1875, which was in operation until the German occupation of France in June 1940. As indicated elsewhere, the events of June 1940 have led to a suspension of the old constitution. A new one is said to be under preparation, meanwhile, the government is carried on under the authority of decrees issued over the signature of Marshal Pétain. A study of the institutions of the Republic is still of interest to the student of Politics as illustrating, among other things, the working of parliamentary government under a multiple-party system, administrative jurisprudence and centralized local administration.

<sup>2</sup> The constitutional law of 25 February 1875

a proposed 'revision'. Authorities on the subject, however, are not agreed on the import of this law;<sup>1</sup> the sound view seems to be that this is not binding on the National Assembly, for what the National Assembly has enacted it may at a later time repeal. Moreover, the *real* sanction behind a constitutional amendment resides in public opinion. When that opinion, as expressed through the National Assembly, demands that the republican form of government itself be made the subject of revision, the constitutional prohibition of 1884 will naturally be brushed aside.

## §2 THE PRESIDENT

The head of the State is the President elected by an absolute majority of the votes of the Senate and the Chamber of Deputies, sitting together as the National Assembly. Any Frenchman who enjoys full civil and political rights, and who does not belong to the royal or imperial houses, may be elected to the Presidentship. The Assembly to elect the President meets at Versailles and is presided over by the president of the Senate. If no candidate has obtained an absolute majority of votes, the president announces a second ballot, and so on, if needful, until a choice is made. The President is elected for seven years and is eligible for re-election.

The President may be removed from office before his legal term is over if found guilty of high treason. The charge is preferred by the Chamber of Deputies before the Senate. The Senate may not only dismiss him from office if he is found guilty, but may inflict any sentence laid down by the penal laws.

In his position and powers, the French President is much like the English king. He is, in the words of Duguit, 'a constitutional king for seven years', the titular head of the Executive, nominally vested with large powers, but enjoined to exercise them on the advice of ministers who are, as in England, responsible to an elected Legislature.

As the executive head of the State, he 'appoints to all civil and military positions' (and, by implication, has power to dismiss the officers), and watches over the execution of the laws. He has the prerogative of mercy, i.e. the right to give a criminal

<sup>1</sup> See R. Poincaré, *How France is Governed*, pp. 162-3, and E. M. Sait, *Government and Politics of France*, pp. 27-8.

a complete or partial remission of his punishment or commute it to a lighter penalty. He 'presides over national solemnities',<sup>1</sup> i.e., as Poincaré puts it, at all official ceremonies he personifies both France and the Republic. He receives the diplomatic agents of foreign powers, negotiates and ratifies treaties and, with the consent of the two chambers, declares war. The terms of treaties need not be communicated to the chambers if the 'interest and safety of the State' require them to be kept secret, but treaties of peace and commerce, and treaties which involve the finances of the State or the persons and property of Frenchmen residing abroad, must be submitted to the chambers for approval, and no cession or exchange or annexation of territory can take place except by virtue of a law.<sup>2</sup> Finally, as commander-in-chief, he controls the armed forces.

As regards legislation, the President's powers are.

(i) He summons and dissolves the Parliament, but, in the performance of this duty, the constitution gives him but little latitude. If he does not summon it sooner, it must meet at the latest on the second Tuesday in January. He may prorogue it, but only after its session has lasted for five months. He may adjourn it, but not more than twice during the regular annual session nor for a longer period than one month in each case. He may dissolve the Chamber of Deputies (the lower House of Parliament) before its legal term is over, but only with the consent of the Senate (the upper House). He may convene a special session of Parliament, but must do so only when an absolute majority of the members of each chamber demands it.

(ii) He may send messages to the Parliament.

(iii) He can initiate legislation.

(iv) He has, over any bill, a suspensive veto (the power to send a bill back for the reconsideration of the chambers), which the chambers may override by a majority.

(v) He has the power to issue ordinances, i.e. a power delegated by the constitution or the Legislature to fill in the details of laws which are couched in general terms.

These are the powers vested in the President by the constitution but, as has been noticed already, he can exercise them only on the advice of ministers. The constitution specifically says: 'Every act of the President must be countersigned by a

<sup>1</sup> The law of 25 February 1875.

<sup>2</sup> *Sait, op cit*, pp. 42-3.

minister' As has been humorously remarked, the only document which does not require such countersignature is the President's letter of resignation! It is easy to conclude from this, as indeed some writers<sup>1</sup> have done, that the President is an automaton, exercising no influence on the politics of the State This, however, is a superficial view The sounder view would appear to be that the *influence*, as distinguished from *power*, which a President wields depends essentially on his personality It is true that the last word on matters of policy must be with ministers, for the reason that power ultimately settles where responsibility resides Nevertheless, the President has some influence He has some discretion in the choice of a new Prime Minister, for in the French Parliament there are many groups and it is not always clear which leader is in a position to command a majority Besides, he is in regular and frequent contact with his ministers 'And while his intervention in affairs is normally limited to the giving of advice,' says W L Middleton,<sup>2</sup> 'that advice comes from a man, who, in most cases, is destined to survive the cabinet he is addressing His knowledge of the work of previous Governments and his acquaintance with the points of all important questions give weight to everything he says' Briefly, while the President must not command, he may advise, whether his advice is taken depends very much on the personal factor, and upon the nature of the advice tendered

### §3 THE COUNCIL OF MINISTERS

The Council of Ministers is the *real*, as distinguished from the *nominal*, Executive. There is no limit fixed by the constitution to the number of ministers, normally there are from twelve to fifteen It is not necessary that they should be chosen from Parliament,<sup>3</sup> but usually they are The process of forming a ministry is similar to that prevailing in Britain the President calls upon the person (whether a member of the Senate or of the Chamber of Deputies or outside the Parliament) who he thinks can command the confidence of a majority in Parliament Only such a person can be summoned to form the ministry, for the

<sup>1</sup> The Abbé Lantagne, for instance, is said to have remarked of the Presidentship that it is 'an office with the sole virtue of impotence'!

<sup>2</sup> *The French Political System*, p. 195

<sup>3</sup> e.g. in the Rochefoucauld cabinet of 1877, and in the Millerand cabinet of 1920, there were ministers without seats in Parliament

constitution specifically states that 'the ministers shall be collectively responsible to the chambers for the general policy of the Government, and individually for their personal acts'. As has been stated earlier, under the conditions of French politics it is not always easy for the President to select the leader who can command the necessary confidence. He therefore consults those who seem to him best qualified to advise him, and notably the presidents of the two chambers. Having decided upon the person, and with his permission, the President appoints him the President of Council (with the countersignature of the President of Council retiring),<sup>1</sup> and appoints the other ministers on the recommendation, and with the countersignature, of the new President of Council.

The Council of Ministers meets, as a rule, twice a week under the presidency of the President of the Republic, and once under the presidency of the President of Council. According to Poincaré, to the two former sessions only does the expression 'Council of Ministers' apply. 'the meeting which is held in the absence of the President of the Republic is known as a Cabinet Council. The Council of Ministers deals with the more important business, the Cabinet Council with current questions of internal politics'. It need hardly be added that, as ministers take collective responsibility for the administration, everything which really concerns the activity of the Government should be discussed and decided at these meetings.

In relation to the Legislature, the Council of Ministers in France hold essentially the same position as the cabinet holds in Britain. They introduce bills in Parliament and defend them; introduce the budget, answer questions addressed to them regarding the administration and, in general, supply the necessary leadership to the Legislature, and resign when they have ceased to command its confidence. There are, however, some differences of detail between conditions in France and in England.

(i) Ministers in France 'have the right of entry in the two chambers and must be heard when they demand a hearing'.<sup>2</sup>

(ii) The constitution provides that the ministers shall be *collectively* responsible to the *chambers* for the general policy of the Government and *individually* for their personal acts. The responsibility of ministers to Parliament is thus in France a matter

<sup>1</sup> Poincaré, *op cit*, p. 103

<sup>2</sup> Constitutional law of 16 July 1875.

of constitutional law, not one of convention as in Britain. Further, the constitutional provision really implies two differences from the position in Britain. It means, first, that, unlike in Britain, it is possible for the chambers to compel the resignation of one minister without such resignation involving the resignation of the whole ministry, and, secondly, that both the chambers of Parliament have equal power to make and unmake cabinets. If the constitutional provision were literally adhered to, immense difficulties would arise in the working of government. Individual responsibility hardly seems consistent with the character of parliamentary government, as it suggests divided counsel and conflicting views within the cabinet.<sup>1</sup> The equal power of the two chambers to hold the ministers responsible to them must result in a deadlock between the two chambers themselves. The working of the constitution, however, shows that these difficulties have been avoided by the development of conventions which more or less approximate the French system to the English. The tendency is to substitute corporate for individual responsibility,<sup>2</sup> and for the Chamber of Deputies to have the greater power—though there are instances, notably that of 1896,<sup>3</sup> in which the Senate forced a united and vigorous cabinet to resign.

More important than these differences of detail between the British and French cabinets are the major differences in their practical working.

(i) Ministers in France are invariably chosen from several parliamentary groups, no one of them being able to command a majority. As a consequence, the ministry lacks that homogeneity which under normal conditions is the outstanding feature of the British cabinet. For the same reason the French cabinet is not able to dominate the Legislature as the English cabinet is able to do. On the contrary, the French Legislature is much more powerful than its English counterpart. This result is helped by a convention. The President's power to dissolve the Chamber of Deputies (with the consent of the Senate) has fallen into disuse, while the power of the cabinet to dissolve the House of

<sup>1</sup> Sait, *op cit*, pp 79-80

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*, pp 79-83. 'In 1896 the Senate took an aggressive attitude and boldly insisted on its right to force the Bourgeois Cabinet out, though that cabinet had the confidence of the Chamber of Deputies.'

Commons before its legal term is over is a powerful factor in explaining cabinet autocracy in Britain<sup>1</sup>

(ii) French cabinets are generally shortlived. It has been reckoned that their average life has scarcely exceeded ten months. In the half century from 1875-1925 France had more than fifty cabinets, England only a dozen. Their fall is generally brought about (unlike in England) by the Legislature and not by the electorate. This is also due to the two causes mentioned above, that ministries are coalitions, and that the cabinet has no power to advise the dissolution of the chamber. The disadvantages to government arising from the instability of the Executive are well known. long-term planning by a Government assured of a reasonably long period of office, so necessary under modern conditions, becomes difficult, legislation suffers<sup>2</sup>, administration also suffers, for 'Parliament, having subordinated the ministers, insists upon administering itself', and the supervision over the executive departments suffers on account of the frequent change of ministers. The results would be much worse if every change of cabinet meant a new set of men coming into office, that is not so in France, for in the reconstructed cabinet some of the former ministers often hold over.

(iii) The Prime Minister in France (the President of Council) is not so powerful as the British Prime Minister, he has often to coax the members to join his cabinet, and having done this he is not in a position to treat them as subordinates.

#### §4 THE SENATE

France, like Britain, has a bicameral Legislature the Senate and the Chamber of Deputies.

The Senate consists of 314 elected members, who are not less than forty years of age. Senators serve for nine years, one-third retiring triennially. The selection is made by an electoral college formed in the chief town of each Department (i.e. district). This electoral college is made up of four elements.

(i) The members who represent the Department in the Chamber of Deputies.

(ii) The members of the General Council of the Department.

<sup>1</sup> See ch. XVI, §9 above.

<sup>2</sup> Saut, *op. cit.*, points out that down to 1914 eight different income-tax bills were shaped in committee and debated by the Chamber without being enacted into law.

(iii) The councillors of arrondissements (divisions of the districts)

(iv) The delegates of the municipal councils of the communes (towns and villages) <sup>1</sup>

Such a mode of election is known as indirect election, for the senators are not elected directly by the primary voters, but all their electors are so elected or are in turn the delegates of those so elected. The result is that, as Poincaré says, the whole nation does indirectly participate in the formation of the Senate. The composition of the Senate is noteworthy in that, by prescribing a special method of election for its members, by giving them a mandate of nine years, and by stipulating that they must have attained the respectable age of forty, the authors of the constitution not only showed their anxiety to differentiate the upper from the lower chamber as clearly as possible, but also wanted to make it a conservative body, which might be effectively used as a brake on political passions

The powers of the Senate are

(i) Its consent is necessary for the President of the Republic to dissolve the Chamber of Deputies. This power is of no importance in practice, for ever since 1877 (when alone it was used) it has not been employed. President MacMahon dissolved the Chamber in that year in order to keep a reactionary ministry in power. But the country refused to uphold the President's action and ultimately forced him to resign.

(ii) It serves as a court of impeachment 'for the trial of the President of the Republic, or the ministers, or to take cognizance of assaults on the security of the State'.

(iii) It shares with the Chamber of Deputies the power of legislation. According to the letter of the constitution, its power of law-making is equal to that of the Chamber except in one respect, viz 'money bills shall be first introduced in, and passed by, the Chamber of Deputies'. In practice, however, the Senate rarely rejects money bills, while it continues to offer amendments, 'but the Senate gives way when the Chamber has acted upon the budget a second time'. In respect of non-financial measures, however, its equal authority has not been seriously questioned.

(iv) Finally, in regard to the control of the Executive, its

<sup>1</sup> It ought to be noticed that these communal delegates form a large majority of the electoral college, and hence the Senate has been called the 'Grand Council of the Communes of France'.



power is, according to the constitution, equal to that of the Chamber of Deputies. As a rule, however, the Senate does not decide the fate of the ministries, and hence cannot control their policy.

Thus the Senate has in practice become decidedly less influential than the lower House. According to a high French authority, Barthélemy, it has inherited from preceding upper Houses the privilege of being ignored—and this, in spite of the fact that the personnel of the Senate is by common consent superior to that of the Chamber of Deputies. The primary reason for this is of course that it is not as representative a body as the directly elected lower House. It will be wrong, however, to conclude that the Senate has been reduced to impotence. It scrutinizes, revises, and delays when necessary. Indeed, it is noteworthy that this very subordinate position of the Senate enables it to receive high praise from a reputed authority on European governments<sup>1</sup> as approaching 'the ideal of what a second chamber ought to be'. For, 'an ideal second chamber should bend very slowly to the gusts of public opinion, but it should never fail to bend when the wind sets definitely in a given direction'. It must serve as a brake, but not too tight a brake, upon the process of legislation. And this function, the French Senate fulfils admirably.

## §5 THE CHAMBER OF DEPUTIES

The Chamber of Deputies, the lower House, is composed of 618 elected members, 599 of them being from single-member constituencies. The right to vote is given to all French citizens, of the male sex, of twenty-one years and above, who have not been deprived of their civil and political rights and who have resided in a constituency for six months.<sup>2</sup> Any voter, twenty-five years of age, is eligible to stand as a candidate for election, provided he does not belong to a family which has reigned in France; there are also many public offices which are incompatible with membership in the Chamber, e.g. that of prefect.

The term of the Chamber is four years, unless it is dissolved sooner by the President with the consent of the Senate. It has

<sup>1</sup> W. B. Munro, *The Governments of Europe*, pp. 470-1

<sup>2</sup> Or the citizen must show that, notwithstanding residence elsewhere, the commune is his place of true domicile or he must have paid direct taxes there for a period of five years, this being taken as evidence of local interest

been noticed earlier that, since 1877, the Chamber has never been dissolved before its legal term is over.

Its functions are more or less similar to those of the House of Commons in Britain: it passes laws subject to the Senate's power of amendment and rejection and subject to the President's suspensive veto; it controls finance, subject, again, to the Senate's power of amendment and rejection; it controls the Executive; it ventilates grievances, it has power to impeach the President and the ministers, and, in conjunction with the Senate, it helps to elect the President of the Republic and to amend the constitution of the State. Compared with the House of Commons, however, it may be noticed that the Chamber of Deputies is theoretically less powerful to the extent that the French Senate is legally more powerful than the English House of Lords. In practice, however, it is considerably more powerful not only because its will is deferred to by the Senate but because it is able to control the cabinet more effectively than the House of Commons is able to control its cabinet.

#### *Law-making and financial control*

The law-making procedure in the Chamber of Deputies is in essentials similar to that in the House of Commons. Bills may be introduced by ministers or private members; in practice most bills are introduced by ministers. On introduction, the bill is referred to a committee.

The Chamber has twenty such standing committees, each one specializing in a given field, such as foreign affairs, agriculture, finance, labour, etc. Each consists of forty-four members (55 in the case of the finance committee) elected for one year by the groups in proportion to their number. No one can be a member of more than two of these committees. In addition to these regular committees, there are other committees consisting of thirty-three members each which are appointed for four years, e.g. the committees on devastated areas and on beverages. Besides, special committees may be appointed from time to time to investigate particular questions, e.g. the one appointed for the preparation of the Peace Treaty in 1918<sup>1</sup>.

It is noteworthy that bills are referred to committees in the French Chamber before their principles are discussed and approved.

<sup>1</sup> R. L. Buell (ed.), *Democratic Governments in Europe*, pp. 414-15

ed by the whole House This method has the advantage that the committee concerned is free to amend and shape the bill referred to it without being 'tied' by limitations. On the other hand, it has the disadvantage that the labours of the committee may be wasted, as the Chamber may reject the bill on the ground that it is opposed to its principles. The committee appoints a reporter to present its report on the bill and defend it on the floor of the House. (Compare this with the practice in the House of Commons, where a minister is in charge of a government bill) A discussion on the bill then ensues, 'which at first bears on the bill as a whole'. A vote is then taken, and if the essential principles of the bill are approved by the House, the bill is then discussed clause by clause; amendments are moved, and finally the bill is passed or rejected. Deputies may vote by proxy with the result that sometimes more votes are cast than there are members in the Chamber! The bill then goes to the Senate, and, if passed by it, to the President for his signature

The budget system in France is also in essentials the same as the British one, with the following differences After the budget is presented to the Chamber, it is referred to the budget committee of forty-four members—not to a committee of the whole House The committee is free to insert, strike out, reduce or increase any item The reporter of the budget committee, not the minister of finance, is in charge of the measure in the Chamber The Chamber, like the committee, can on its own initiative insert new items or increase the amount for any item presented, it is not necessary that the demand should come from the President. Though this is the theoretical position, it is noteworthy that in recent years the French practice in this matter has been approximating to the English system, i.e. changes are made in the budget, both in committee and in the Chamber, with moderation and with the approval of the Government It is realized more and more that, otherwise, not only does the budget lose all unity but the way is open for the undue influence of local interests in the expenditure of public money

### *Control of the Executive*

That the Chamber has great power over the cabinet has been indicated elsewhere The most important causes of this power, undoubtedly, are first, that the cabinet is normally unable to

command the 'stable support of a homogeneous party'; and, second, that it is, by convention, denied the power (wielded by the English cabinet) to dissolve the House before its legal term is over. The Chamber feels free, especially because the reporter of a committee—not the concerned minister—is in charge of a bill, to mutilate important Government bills. Its control over finance gives the cabinet much less freedom than they require in the formulation of policy. Further, the permanent committees of the Chamber, having specialized in particular subjects, 'tend to become intimately acquainted with departmental business and to interfere in its conduct'. They summon officials and subject their actions and proposals to severe criticism, 'the minister finds himself checked in countless ways and hampered in his freedom of action'. Besides, the French parliamentary procedure allows what is known as 'the interpellation', in addition to questions addressed to ministers regarding the administration of their departments. An interpellation is a question which may be followed by a discussion and a vote. If the vote turns against the Government, they may be compelled to resign. The interpellation is a vicious institution.<sup>1</sup> It puts the cabinet in a position of great disadvantage, for it permits an adverse vote on the cabinet on a matter of secondary importance, taken hastily or under excitement. To secure the proper stability of a ministry, such adverse votes ought to be taken only on measures of really great importance, or on questions that involve the whole policy and conduct of the Administration. The reverse is true of the French system of interpellations.

## §6 THE JUDICIAL SYSTEM

The most remarkable feature of the French judicial system<sup>2</sup> is that there are *two* regular sets of courts, the ordinary and the administrative. Broadly speaking, the former try disputes between private citizens, the latter, those in which one of the parties is a public official.

### Organization

The ordinary courts have Justices of the Peace at the bottom of the ladder. Above them come the district courts, the courts of appeal, the courts of assize and, at the top, the Court of Cassa-

<sup>1</sup> A. L. Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 120-3.

tion Judges are appointed by the President of the Republic on the advice of the Minister of Justice. The judges of all except the lowest and the highest courts hold office during good behaviour, i.e. they cannot be removed by the Executive and are answerable for their conduct to the Court of Cassation alone. Justices of the Peace and judges of the Court of Cassation may, however, be removed by the Executive, by convention, however, they are hardly, if ever, removed for political reasons.

The principal administrative courts are the twenty-two inter-departmental or regional councils of the prefecture, each serving from two to seven Departments<sup>1</sup> and the Council of State. The former are the lowest administrative tribunals and consist of a president and four councillors each, appointed by the Minister of the Interior. The Council of State is the highest administrative court. This Council has varied functions, including that of advising ministers regarding the issue of statutory orders. One of its sections, composed of 39 members appointed by the President of the Republic on the advice of the Council of Ministers, acts as the highest administrative court hearing appeals from regional councils and having original jurisdiction in a defined class of cases.

If disputes arise between the Court of Cassation and the Council of State, they are decided by a Court of Conflicts. This court consists of the Minister of Justice as president, three judges of the Court of Cassation, three of the Council of State and two other persons chosen by the foregoing seven.

We may now consider in some detail the relation of French courts to the Legislature, and the French system of administrative jurisprudence.

### *Relation of courts to the Legislature*

In view of the fact that the constitution of France, like that of the U.S.A. and unlike that of Britain, is a written and rigid one, it might be expected that the French courts, like the American, would have the power to inquire into the constitutionality of a law. As it is, however, the Court of Cassation has held that it has no power to do so. The reasons are twofold. First, unlike the U.S.A., France is not a federal State. It is unnecessary for the courts in a unitary State to act as the guardian of the

<sup>1</sup> In addition, the Department of the Seine has a council of its own

constitution, because there is 'no division of powers between two sets of authorities to be protected against mutual encroachment' And, secondly, the French courts do not derive their authority from the constitution, they are the creation of the Legislature, and so, if the courts dared to declare a law unconstitutional, the Legislature by a law could check it. The French practice thus resembles the British in this regard.

### *Administrative jurisprudence*

Administrative law has been defined by Dicey as 'the body of rules which regulate the relations of the Administration or the administrative authority towards private citizens'. It is that portion of French law which determines (i) the position and liabilities of all State officials, (ii) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii) the procedure by which these rights and duties are enforced. This law differs considerably from the law which governs the relation of one private citizen to another, and it is administered by tribunals different from the ordinary ones.

Poincaré illustrates<sup>1</sup> the meaning of administrative law by two telling examples. Let us suppose, he says, that the Administration of Direct Taxes has taxed a citizen too highly. The taxpayer has received his schedule and finds upon it an unjustifiable increase, against which he wishes to protest, he must address himself to the Council of the Prefecture.<sup>2</sup> Again,

'a railway has been built in front of my door, my house was not required, I have not been expropriated, but an enormous embankment blocks the view from my windows, I can no longer see well within doors, my property has lost the greater part of its value. I protest. Here again is an administrative action whose results must be estimated. I cannot take my claim to the civil court, but I can submit it to the Council of the Prefecture.'<sup>3</sup>

The system of administrative law is based, according to Dicey, on two leading principles.

(i) Government and every servant of the Government possess as representatives of the nation, a whole body of special rights,

<sup>1</sup> *op cit*, p. 271

<sup>2</sup> The Councils of the Prefecture have since been replaced by regional councils as explained earlier.

<sup>3</sup> Now to the regional council.

privileges or prerogatives as against private citizens, and the extent of these rights, privileges or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another

(11) It is necessary to maintain the separation of powers between the Legislature, the Executive and the Judiciary. The English people interpreted this doctrine to mean that the ordinary judges ought to be irremovable by, and thus independent of, the Executive, the French, that the Government and its officials ought to be independent of, and to a great extent free from, the jurisdiction of the ordinary courts, to be free to act for the public weal without let or hindrance from the latter. A statute of 1790 gave effect to this maxim by providing that the judges should not interfere in any way with the work of administrative authorities or proceed against the officers of the Government on account of their official acts. The principle laid down here has been observed ever since.

Which system is better—the rule of law or administrative law? Englishmen, nurtured on the principles taught by Dicey, still regard the rule of law as the corner-stone of their liberty. It is now generally recognized, however, that Dicey unduly exaggerated the merits of the rule of law and the defects of administrative law. In theory, it is true, there is always the danger that justice may not be secured in administrative courts if governmental policy demands a certain decision. Further, individual rights may be sacrificed when the Administration is both the offender and the judge of the offence. In the light of French experience, however, it is not true to say that under administrative law there cannot be liberty. On the contrary, Frenchmen consider administrative law essential to their liberty. There is no ground for any suspicion of partiality on the part of the administrative courts in favour of the official, if anything, the complaint is the other way about. The Council of State as the highest administrative tribunal has established traditions of impartiality which leave no room for doubt on the matter. Litigation in administrative courts is also cheap and executed rapidly, and the procedure is simple. Further, administrative tribunals can be manned by individuals possessing special experience or training in particular fields. Above all, the private citizen in France often gets better *real* redress from his administrative courts than the English-

man from his ordinary courts, because if a plaintiff receives an award of damages under the French system, the judgement is against the Government and enforceable, whereas an award rendered under the English system is only against the offending official personally, from whom, as likely as not, it is impossible to obtain actual redress<sup>1</sup> This explains the remark of Goodnow<sup>2</sup> (a high authority) that the administrative courts have shown themselves more favourable to private rights than the ordinary courts

## §7 POLITICAL PARTIES

There are several political groups in France, this fact is the key to the understanding of French politics It explains the shortlived, weak, coalition cabinets, the dominance of the Legislature over the Executive, and the practical necessity under which cabinets are placed to win votes by granting favours to individual deputies Briefly, the parliamentary system in France has not worked smoothly because of her multiple-party system

At first sight, there seems to be nothing but confusion in the French party system

'It would be of little use to try to analyse the precise purpose of each of the twenty or more groups<sup>3</sup> which revolve so kaleidoscopically in the Chamber and the Senate, for many of them have none They change not only from one election to another, but they come and go even within the life of one Chamber The group labels are not the same in the Senate and in the Chamber The labels under which elections are fought are often quite different from the labels adopted by groups in the Chamber There are some important parties in the country which are not represented at all in the Chamber'<sup>4</sup>

But underneath this seeming confusion, a certain 'pattern of politics' can be discerned Following Valeur<sup>5</sup> we may group French parties according to four main tendencies conservatism, liberalism, radicalism and socialism

The conservatives enlist among their supporters two main sections of the people the clericals and the rich aristocracy Naturally they view with sympathy the claims of the Church and

<sup>1</sup> Ogg, *English Government and Politics*, p 612

<sup>2</sup> F J Goodnow, *Comparative Administrative Law*, Vol II, pp 220-1, 231

<sup>3</sup> In the Chamber of Deputies as it stood in 1939 no fewer than 17 groups were officially recognized

<sup>4</sup> D Thomson, *The Democratic Ideal in France and England*, pp 57-8

<sup>5</sup> In Buell, op cit, pp 465ff



favour the restoration of property taken from it. They would like to strengthen the army and the navy and to allow industry greater freedom from State control. To this school of thought belongs the National Republican Party.

Conservatives who accept the principle that the Church should keep out of politics may be called liberals<sup>1</sup>. Clericalism is a strong force in French politics, the liberals are those who would not countenance any interference on the part of the Church with the government of the country. The Democratic Alliance Party is, broadly speaking, liberal in its outlook<sup>2</sup>.

The radicals may best be described as those who continue the tradition of the French Revolution. They believe in the principles of liberty, equality and fraternity, they are ardent nationalists, democrats and individualists. They are anti-clerical, viewing with disfavour the interference of the Church in politics. Briefly, they distrust authority and hate privilege which cannot be justified by considerations of social good. To this group belong the Radical Socialists.

And lastly the socialists. They are themselves divided into several groups, the United Socialists, the Republican Socialists, and the Communists. It is noteworthy that the majority of French socialists have rejected the Marxist philosophy of communism. They would, broadly speaking, advocate collectivism, the nationalization of key industries, the increase of taxation on the wealthier classes, and progressive labour legislation such as the forty-hour-week law. In general they also advocate woman suffrage, and support the policy of disarmament among the nations. At the extreme left are the Communists.

#### *Causes of the large number of parties in France*

The existence of numerous parties in France is due to two main causes—the temperament of the Frenchman, and the lack of continuity in French history since the French Revolution.

Compared with the Anglo-Saxon, the Frenchman is theoretical rather than practical in politics<sup>3</sup>.

‘He is inclined to pursue an ideal, striving to realize his conception of a perfect form of society, and is reluctant to give up

<sup>1</sup> Valeur in Buell, *op cit*, p. 470.

<sup>2</sup> According to Ogg (*op cit*, p. 545), the Radical Socialist Party is the true liberal party of France.

<sup>3</sup> Lowell, *op cit*, Vol. I, p. 105.

any part of it for the sake of attaining so much as lies within his reach. Such a tendency naturally gives rise to a number of groups, each with a separate ideal, and each unwilling to make the sacrifice that is necessary for a fusion into a great party.

He is also strongly individualist, desiring rather to follow his own bent of mind than to follow others. Party organization in France is therefore extremely flexible: the parties indeed are 'groups of elected representatives who bear some distinctive label, who may or may not be supported by regular organizations among the voters, who may or may not be pledged to some definite programme, and who may or may not be subject to party discipline.'

Secondly, France had a turbulent history<sup>1</sup> during the nineteenth century, so much so that she became a byword for social instability and political fickleness. From 1791 to 1870 she devised for herself no less than eleven complete constitutions, none of which was destined to remain in force for any length of time. From the Bourbon monarchy of the *ancien régime*, she passed to the Republic of 1793, and thence, by turbulent stages, to the Empire of Bonaparte. Between 1815 and 1870 'she passed from the Bourbon Monarchy of Louis XVIII and Charles X and the bourgeois monarchy of Louis Philippe to the Second Republic of 1848, and thence to the Second Empire of Napoleon III in 1852.' The Second Empire collapsed on 4 September 1870, and after five years of deadlock, the Third Republic was finally established in 1875. This want of continuity in French history is connected with the group system in this way. Frenchmen have been unable to evolve a 'political consensus', to use a phrase of Lowell's, so necessary for the development of strong parties. Parties in Britain and America primarily differ in the methods of conducting government, on the fundamentals of which men agree. If that agreement on fundamentals itself is lacking, parties cannot grow properly, because 'irreconcilables' become numerous and they become disturbing factors in the evolution of political life, and of parliamentary government itself. Thus

'every form of government that has existed in France has its partisans, who are irreconcilable under every other, while the great mass of the middle classes and the peasants have no

<sup>1</sup> Thomson, *op cit*, pp. 26-7

strong political convictions, and are ready to support any Government that maintains order'.<sup>1</sup>

## §8 LOCAL GOVERNMENT

The most important feature of local government in France is its centralization. As has been well said 'The minister of the interior at Paris just presses a button—the prefects, sub-prefects, and mayors do the rest. All the wires run to Paris'.<sup>2</sup> This centralization (with its corollary, uniformity) is a contrast to the decentralized character of English local government. The principle accepted in England, that a local area has the right to conduct its affairs in its own way without being hindered by a rigid and paternal supervision of central authorities (except in so far as such supervision is clearly demanded by the general interest and necessary to prevent gross inefficiency), is foreign to the French system.

The main local areas of France are the Departments, the arrondissements, and the communes.

There are ninety Departments. The executive head of the Department is a prefect appointed and removable by the President of the Republic on the advice of the Minister of the Interior. He occupies a dual position. As the agent of the Central Government, he is responsible for the enforcement of the national laws within his Department on such matters as education, sanitation, agriculture, highways, the public domain, taxation and police. He appoints a host of officials such as inspectors and menders of highways, tax-collectors, postmasters, and the teaching staff of the public primary schools. In the same capacity he controls the sub-prefects and mayors (the heads of administration in smaller local areas, who are also agents of the Central Government for many purposes) and has power to annul the orders of the municipal councils. In carrying out these duties, the prefect is bound by detailed instructions from the Central Government. The prefect is also the executive head of his Department. As such, he initiates all business for the consideration of the general council of the Department, prepares a budget for local expenditure,

<sup>1</sup> Lowell (op cit, pp 108ff) gives three other causes for the existence of numerous parties in France—the method of electing deputies, the system of committees in the chambers and the practice of interpellations. It may be asked whether some of these, at any rate, are not rather *consequences* than *causes*, in any case they must be considered of secondary importance.

<sup>2</sup> Munro, op cit, p 567

appoints the employees of the Department; and executes the resolutions of the council. In his dealings with the council, he is master rather than servant; for his tenure is dependent not upon it but upon the Minister of the Interior

The general council of the Department consists of members elected for six years on manhood suffrage, one from each canton within the Department. The president is elected by the council. The council normally meets twice a year, its sessions are public. In general its competence is limited to affairs that are deemed to have a strictly local interest—poor relief, public buildings, highways, bridges, traffic, and the like. Even so, as Poincaré noted, its sessions are important and interesting

'One after another the councillors submit reports to the assembly. What a number and what a variety of questions! A bridge is to be built on a departmental highway, a concession is required for a railway of local importance, a main highway requires to be classified as such, a court of law or a prison is in need of repairs, an idiot asylum needs a bathing-hall, agricultural societies require bounties, there are friendly societies to be controlled, receipts to be collected, credit accounts to be opened, taxes to be settled. Report follows upon report with bewildering rapidity. . . From time to time the assembly grows warm in respect of some question of fishery, hunting, or netting birds, from time to time also it is aroused by some political question'<sup>1</sup>

The effective power of the council is, however, limited in four ways (a) The prefect, who is its executive authority, is not appointed by or responsible to it (b) There are national laws on matters within its jurisdiction, which it cannot disregard (c) Its decisions may be overruled by the central authorities at Paris. (d) It is dependent on the prefect's initiative. 'In general it may be said that in matters falling within its province the general council cannot do everything it wants, but can prevent almost anything it does not want'<sup>2</sup>

The Departments are divided into arrondissements, each is a Department in miniature, with a sub-prefect and an elective council made up of one member from each canton<sup>3</sup> within the arrondissement. It is, however, a mere administrative district

<sup>1</sup> Poincaré, *op cit*, p 69

<sup>2</sup> Lowell, *Greater European Governments*, p 140

<sup>3</sup> A French canton consists of several communes

‘without corporate personality, with no property, revenues, or expenses of its own’, and neither the sub-prefect nor the council has any real power.

And, finally, the smallest area of local government is the commune (a town or a parish). Every commune has a municipal council of from 10 to 36 members elected for six years on manhood suffrage. The council holds four ordinary sessions every year, the sessions are public. It ‘regulates by its deliberations the affairs of the commune’. Its resolutions are of executive force by themselves, subject to three limitations <sup>1</sup> (i) certain municipal proceedings are subjected to the approval of the prefect; (ii) others, of greater importance, to the approval of the Government; (iii) others, more important still, to the approbation of the chambers. It elects its mayor, the executive head of the commune, but it has no power to remove him. The mayor occupies a dual position. he is the agent of the Central Government, in matters relating to the police, public health, finance, etc., he also draws up and signs, before legal witnesses, the deeds relating to marriages, births, and deaths. He is also the executive of the commune, and, as such, carries out the resolutions of the municipal council in local matters like sanitation, protection against fire, the maintenance of order, and the protection of rural property. He ‘may prescribe the watering of the roads, the removal of mud, snow, filth, and the sweeping of the pavements; in this way he can forbid the straying of dogs, the shaking of rugs out of the window, the excessive speed of automobile carriages, and what not. In a word he watches over the life, health, tranquillity, and even the slumber of those in his administration’.

In carrying out many of his duties, the mayor is bound to obey the orders of the prefect (the head of the Department), he may be suspended from office for a month by the prefect, or for three months by the Minister of the Interior and can be removed from office by the President of the Republic.

The spirit of French local government is best expressed thus: all authority in the State is deemed originally to be in the Central Government, with local government existing rather for the convenience of the Central Government than for the training of the people of the locality to manage their own local affairs.

<sup>1</sup> Poincaré, *op cit*, p. 47

§9 RECENT CHANGES<sup>1</sup>

The constitution of France has undergone a thorough change consequent on the French defeat at the hands of Germany in June 1940. In reporting to the French people on the state of affairs in France on 25 June 1940, Premier Marshal Pétain said: 'It is toward the future that we turn our efforts. A new order commences.' The basis of the new order is the law passed by the National Assembly on 10 July amending the constitution by giving the Government the power to promulgate a new fundamental law.<sup>2</sup>

'The National Assembly gives all powers to the Government of the Republic, under the authority and the signature of Marshal Pétain, to effect the promulgation by one or more acts of a new constitution of the French State. This constitution shall guarantee the rights of labour, of the family, and of the country.'

'It shall be ratified by the nation and applied by the assemblies which it shall have created.'

'The present constitutional law, deliberated and adopted by the National Assembly, shall be executed as the law of the State.'

The National Assembly did not, however, fix a date for the submission of the new constitution to the people. Meanwhile, Parliament has been adjourned indefinitely, and the Government functions under the authority of a series of decrees issued over Pétain's signature on 11 July and later dates.

At the head of the present Government is the new office of Chief of State, which combines in itself the offices of President of the Republic and of the Council of Ministers. Marshal Pétain now holds the office, it is provided by law that if for any reason Pétain is unable to exercise his functions as Chief of State, before the ratification of the new constitution, his successor will be designated by the Council of Ministers. The powers of the Chief of State are thus enumerated.<sup>3</sup>

<sup>1</sup> *The American Political Science Review*, Vol XXXV, pp 86ff

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*. A later decree dated 19 April 1942 announced the creation of a new office, 'the Chief of Government', in nominal subordination to the Chief of State but in reality likely to cause an important change in the position and powers of the Chief of State. 'The effective direction of the Home and Foreign policy of France has been taken over by the Chief of Government appointed by the Chief of State and responsible to him. The Chief of Government nominates his ministers in agreement with the Chief of State and is accountable to him for his acts and undertakings.' M. Laval was at the same time made Chief of Government.

(i) The Chief of the French State has complete governmental power, he names ministers and Secretaries of State, who are responsible only to him

(ii) He exercises legislative power in consultation with his ministers until the formation of the new assemblies; also after their formation, in case of external tension or of a grave internal crisis, he exercises legislative power on his sole decision and in the same form. In the same circumstances, he can decree all budgetary and fiscal orders

(iii) He promulgates the laws and assures their execution

(iv) He appoints to all civil and military positions for which by law no other mode of designation has been made.

(v) He disposes of the armed forces

(vi) He possesses the power to pardon and to grant amnesty.

(vii) Envoys and ambassadors of foreign countries are accredited to him. He negotiates and ratifies treaties

(viii) He can declare a state of siege in one or more portions of the territory

(ix) He can declare war without the previous assent of the legislative assemblies

The Council of Ministers continues to exist. The law provides that it shall be presided over by the Chief of State, and that it shall include fifteen ministers, among whom shall be the ministers in charge of justice, foreign affairs, finance, national defence, public instruction, agriculture, communications and colonies. There are 21 Secretaries-General to serve as administrative assistants under the members of the cabinet, appointed and dismissed by the Council of Ministers and each responsible, while in service, to the minister under whom he serves

Various changes are being made, or are under contemplation, in the social and economic life of the country. It is sufficient, in this context, to mention the general trend of these changes towards an authoritarian regime as indicated in the following message to the French people by Marshal Pétain<sup>1</sup>

'Our programme is to give France the strengths she has lost. She will find them only by following the simple rules which, at all times, have assured the life, health, and prosperity of nations. We shall create an organized France, where the discipline of the subordinates answers to the authority of the leaders,

<sup>1</sup> *ibid*

with justice for all. In all spheres, we shall strive to create an *élite* and to confer leadership upon them with consideration only for their capabilities and merits.'

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## CHAPTER XVIII

# THE UNITED STATES OF AMERICA

### §1 THE CONSTITUTION AND ITS AMENDMENT

The U S A is a federal State, a union of 48 states

The constitution of the U S A was made by a convention of the original American states (thirteen in number), held at Philadelphia in 1787 under the presidency of George Washington, and, having been accepted by the required number of nine states, came into effect on the first Wednesday in March (4 March) 1789. More states were admitted into the federation later, by the method<sup>1</sup> provided for in the constitution for the admission of new states.

An amendment to the constitution may be proposed as has been noted elsewhere<sup>2</sup> by a two-thirds vote in each House of Congress or by a convention called by Congress upon the application of the Legislatures of two-thirds of the states. The amendments proposed by either body must be ratified by the Legislatures of three-quarters of the states or by conventions in three-quarters of the states. Congress determines which method of ratification shall be used in each specific case. No state, however, shall without its consent be deprived of its equal suffrage in the Senate.

An analysis of this method shows that, since either method of proposing amendments may be combined with either method of ratification, a total of four methods is possible. Actually, however, only two of the four methods possible have been used to bring about the twenty-one amendments so far ratified.

(i) Proposal by a two-thirds vote in each House of Congress and ratification by three-quarters of the state Legislatures.

(ii) Proposal by a two-thirds vote in each House of Congress and ratification by conventions in three-quarters of the states.

Three criticisms of the amending process are usually offered

(i) It is too slow and difficult. This is proved by the fact that during the hundred and fifty years that have elapsed since the adoption of the constitution, only twenty-one amendments have become law. A constitution must adjust itself to changing

<sup>1</sup> Article IV, section 3(1)

<sup>2</sup> Article V, see above p 59

times ; but the American constitution is unable to do so because its amending process is 'unwieldy and cumbrous'. For instance, in 1924 Congress proposed an amendment that it 'shall have power to limit, regulate, and prohibit the labour of persons under eighteen years of age', it has not yet been ratified by the required number of states (ii) Others think it is too easy and cite the speedy ratification of the eighteenth amendment, which introduced prohibition in 1918-19, in support of their view American opinion in general is, however, inclined to support Madison's view that the method of amendment guards 'equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate discovered faults' (iii) The method enjoins the express consent of every state, whose representation in the Senate it is proposed to make less than that of some other state Is it impossible for the amending body legally to alter this provision? The issue is not at present a live one ; it is sufficient to say that such a change implies the breaking of a pledge given to the small states at the time when the constitution was framed, and it is not likely that it will be seriously proposed

## §2 DIVISION OF POWERS

In a federal State, there must be a division of powers between the Centre and the units In the U. S A the constitution (i) enumerates the powers of the Centre , (ii) prohibits the Centre from doing certain things , (iii) prohibits the states from doing certain things and (iv) leaves the residue, i.e the powers not delegated to the Centre or prohibited to the states, to the states (or to the people).

(i) Congress is given power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States ; to borrow money on the credit of the United States , to declare war , to raise and support armies and to maintain a navy ; to regulate commerce with foreign nations and among the several states , to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy , to coin money and regulate the value thereof, and fix the standard of weights and measures ; to establish post offices ; to legislate for the national capital and the small district in which it is situated, i.e for the city of Washing-

ton and the district of Columbia in which it stands ; to make all needful rules and regulations respecting the territory or other property belonging to the United States ; and generally to make all laws which shall be necessary and proper for carrying into execution the foregoing powers

(ii) The powers prohibited to the Centre are that it may not suspend the privilege of the writ of habeas corpus ' unless when in cases of rebellion or invasion the public safety may require it ' ; may not pass a bill of attainder or *ex post facto* law ; may not impose any tax or duty on articles exported from any state ; may give no preference ' by any regulation of commerce or revenue to the ports of one state over those of another ' , and may make no law respecting an establishment of religion nor prohibit the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances The constitutional provisions<sup>1</sup> further prohibit unreasonable searches and general warrants ; require serious crime to be tried on indictment found by a grand jury , forbid any person to ' be subject for the same offence to be twice put in jeopardy of life or limb ' , to be compelled in any criminal case to be a witness against himself, or to be deprived of life, liberty, or property without due process of law

(iii) The prohibitions on the states are that no state may enter into any treaty, alliance or confederation ; coin money ; utter bills of credit ; make anything but gold and silver coin a tender in payment of debts ; or pass any bill of attainder, *ex post facto* law, or any law impairing the obligation of contracts Further, they are forbidden, without the consent of Congress, to levy imposts or duties on imports or exports ' except what may be absolutely necessary for executing its inspection laws ' ; or any duty of tonnage to ' keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay ' ; to permit slavery ; and to deny the franchise on account of ' race, colour, or previous condition of servitude ' or of sex Finally, no state ' shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any

<sup>1</sup> Articles IV and V of the Constitution

state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of law'.

(iv) *Residuary powers* 'The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'<sup>1</sup>

It may be added, finally, that the Federal Government has certain obligations to the states (i) It must respect their territorial integrity, Congress is directed by the constitution to see that no new state is 'formed or erected within the jurisdiction of any other state, nor any state . . . formed by the junction of two or more states or parts of states, without the consent of the Legislatures of the states concerned' (ii) It must protect them against invasion and, on application from their Legislature or from the Executive (when the Legislature cannot be convened), against domestic violence (iii) It must guarantee to every state a republican form of government

### §3 THE PRESIDENT

The President is the head of the Executive in the U S A He is elected for four years There is no limit set by the constitution to the number of times a President may be re-elected, but, until 1940, it was an accepted convention started by the first President, George Washington, that a third term was undesirable, being considered unrepugnant In 1940, however, under the stress of a world war, President Roosevelt was elected for a third time. It seems likely, having regard to the prestige which the name of Washington commands in America, that the two-term convention will be revived hereafter

Any natural-born American citizen, at least thirty-five years of age and 'fourteen years a resident within the United States', may stand for election

The election of the President is by an electoral college formed for the purpose The constitution says that the number of electors chosen in each state shall be equal to the number of members of the House of Representatives and of the Senate for that state, in other words, equal to the state's representation in Congress The electors shall meet in their respective states and vote by ballot for President and Vice-President

<sup>1</sup> Article X

‘The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed ; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President’

A similar provision is laid down for the choice of the Vice-President, with the difference that if no candidate secures an absolute majority of votes, the Senate shall choose the Vice-President, ‘from the two highest numbers on the list’.

The theory of the constitution is clear the President must be chosen by the best men of the country untrammelled by any party ties or engagements, ‘on the sole ground of their judgement of the personal fitness of the leading men in the country’. The makers of the constitution thought that it would be as unnatural to make the people the judges of the candidate for the chief magistracy as it would be to refer a trial of colours to a blind man. Indeed ‘one of the principal aims of the founders of the American Republic was to make the New World safe against democracy’. In practice, however, the aims of the constitution-makers have hardly been realized. It is a part of the unwritten constitution that the electors shall cast their votes in accordance with the popular vote<sup>1</sup> that elected them. No penalty would attach if an elector should deviate, but, we have it on high authority<sup>2</sup> ‘that no elector, since Plumer of New Hampshire did so in the second election of Monroe,<sup>3</sup> has deviated from his instructions’. The various parties hold their national conventions long before the date fixed for the Presidential election and select their candidate. When the voters vote for the electors, therefore, they know also, in effect, for which Presidential candidate they are voting, so that, as soon as the popular vote is counted, not only are the electors known but also the coming President. The meeting of the electors afterwards is a mere form.

The President may be removed from office before his legal term is over on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanours. The House of Representatives adopts by resolution articles of impeachment

<sup>1</sup> Since the sixties of last century, in every state (with exceptions for brief periods), the electors have been chosen by popular election, though the constitution does not prescribe it.

<sup>2</sup> W. R. West, *American Government*, p. 134

<sup>3</sup> 1820

charging the person concerned with certain high crimes, and enumerates his particular offences, and chooses leaders to direct the prosecution before the Senate, which acts as the High Court. The Chief Justice of the Supreme Court presides. A two-thirds vote of the members present is necessary for a conviction. The penalty may not extend further than the removal of the offender from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States, but 'the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgement and punishment, according to law'. So far only one President, Johnson, has been impeached (1868), he was, however, acquitted.

### *His powers*

The powers of the President may be discussed under three heads, executive, legislative and judicial.

(i) *Executive* The President is the head of the national administration. It is his duty to see that the 'constitution, laws, and treaties of the United States and judicial decisions rendered by the federal courts are duly enforced throughout the country. In the fulfilment of this duty, he may direct the heads of departments and their subordinates in the discharge of the functions vested in them by the acts of Congress'. The department of foreign affairs is more especially subject to his control. As administrative head, the President appoints a large number of federal officers with the advice and consent of the Senate, Congress may, however, by law vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. It is now a convention that the Senate does not normally refuse its consent to the President's choice of heads of departments who act as his principal advisers. The Senate's consent is not necessary for the removal of officers by the President. The President is the commander-in-chief of the army and the navy. The conduct of foreign affairs is in his hands, but a treaty made by him requires the ratification of two-thirds of the Senate. Finally, though the power to declare war belongs to Congress as a whole, 'clearly executive action may bring negotiation to such a pass as to make war almost inevitable'.

(ii) *Legislative* To grasp clearly the function of the President in relation to legislation, it is necessary to recall the fact

that the American Executive is non-parliamentary, i.e. is neither chosen by nor from the Legislature nor removable by it. Further, the President or his advisers do not have (either by law or custom) the right to be present in Congress and take part in its deliberations, and therefore they are not in a position directly to provide the initiative and guidance in law-making, so largely and effectively provided in the British Parliament by its cabinet. Nor has the President the right to summon (except for extraordinary sessions) or dissolve Congress. It must not, however, be thought that therefore the President's share in legislation is unimportant. As a leading authority has put it <sup>1</sup>

'We elect the President as a leader of legislation. We hold him accountable for what he succeeds in getting Congress to do and in preventing Congress from doing. Once in office, except for considerations of the patronage, which is politics rather than executive business, the time and thought of the President and his cabinet are devoted far more largely to legislative than to executive matters. This is true even when Congress is not in session.'

He exercises his influence in legislation in the following ways —  
 (a) He may summon extraordinary sessions of Congress. (b) He may send messages to Congress (or deliver them in person as Wilson did effectively), giving information on the state of the Union and recommending for consideration such measures as he may judge necessary and expedient. Wilson, it is said, was extraordinarily successful in securing action upon the proposals conveyed in his messages. (c) He may ask a member of Congress to embody his ideas on a certain subject in a bill, and set the party machinery in motion to get it accepted. The effectiveness of this depends primarily on whether the party to which the President belongs commands a majority in Congress. (d) He may refuse his consent to a bill passed by Congress, this must be done within ten days (Sundays excepted), after the bill has been submitted to him. If he does, it must, in order to become law, again be passed in each House by a two-thirds majority. This is an effective power to prevent hasty and unwise legislation and has been frequently used—indeed about as many as six hundred times. In certain circumstances, this limited or suspensive veto may become an absolute veto, i.e. without a chance

<sup>1</sup> H. L. McBain, *The Living Constitution*, p. 116

for Congress to repass the vetoed bill by the required majority. This happens when Congress adjourns before the ten days (allowed for the President to study the bill) are up, and the President refuses to sign the bill. This is termed a 'pocket veto'. (e) He has the ordinance power, i.e. the power exercised under congressional authority to supplement general legislation with detailed rules that have the effect of law.

(iii) *Judicial* The President has the power to grant reprieves<sup>1</sup> and pardons for offences against the United States, except in cases of impeachment.

### *The cabinet*

The constitution does not mention a cabinet for the purpose of collectively formulating the policy of the nation, it authorizes the President only to 'require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices'. By convention, however, from 1791, it has been usual for the President to summon meetings of the heads of the executive departments (normally twice a week) for the discussion of important governmental matters. The proceedings are informal and confidential. Cabinet discussions are useful in clarifying views and helping the President to make up his mind, but he is not bound by any decisions arrived at, his responsibility remains single and undivided. President Lincoln is said to have said 'Seven nays, one aye—the ayes have it', when he found in a cabinet consultation that all members of the cabinet were against him.

The Presidency of the U S A is one of the greatest political offices of the world. Its occupant 'has become—with the exception of certain of Europe's dictators—the most powerful head of a government known to our day'.<sup>2</sup> His public pronouncements and actions are watched with the greatest interest throughout the world. Unlike the King of England and the President of France under the Republic, his power is real, being exercised on his own responsibility. As Sir Henry Maine has aptly said, the King of England reigns but does not govern, the French President neither reigns nor governs, the American President governs, though

<sup>1</sup> A reprieve is a stay in the execution of a sentence.

<sup>2</sup> F A Ogg and P O Ray, *Introduction to American Government*, p. 284.



(not being a king) he does not reign. The people look up to him for leadership.

'The nation as a whole', Wilson has said,<sup>1</sup> 'has chosen him (the President), and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unified action, and it craves a single leader.'

#### §4 THE SENATE

Congress is the Legislature of the United States. It consists of two bodies, the Senate and the House of Representatives.

The Senate is composed of 96 members, two senators from each state, chosen by popular vote for six years. 'The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislatures.' One-third of them retire every two years. Senators can be, and often are, re-elected. 'No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.'<sup>2</sup> Further, during their tenure, senators may not hold any office under the United States.

The Senate is a powerful body and exercises a very real influence in national affairs, such as is perhaps exercised by no other second chamber in the world. (i) It has equal powers with the House of Representatives in ordinary legislation. (ii) In respect of money bills, its powers are according to the law of the constitution inferior to those of the lower House only in one respect, viz. it cannot initiate bills for raising revenue; by custom, appropriation bills also originate in the lower House. But the Senate is free to amend and reject any money bill. (iii) Its consent (by a two-thirds majority) is necessary for treaties. How important

<sup>1</sup> W. Wilson, *Constitutional Government in the United States*, p. 68

<sup>2</sup> Article I., section 3

this power is may be seen from one instance When President Wilson returned from Europe to his country after having signed the Covenant of the League of Nations on behalf of the U. S. A (1918-19), the Senate refused to ratify his action. This refusal had important consequences on international relations. (iv) Its consent is necessary for appointments by the President (except for the power of appointing inferior officers vested by Congress in the President alone) (v) It has the power to try all impeachments Judgement in cases of impeachment shall not, however, extend beyond removal from office and disqualification from holding and enjoying any office of honour, trust or profit under the United States

Among the Senate's other powers are that it shares with the House of Representatives the power to propose amendments to the constitution and the power to admit new states to the Union If in a Vice-Presidential election no candidate secures an absolute majority, the Senate has to choose the Vice-President from among the two candidates who have secured the largest number of votes It is the judge of the elections, returns and qualifications of its own members

That the Senate of the U S A is one of the most powerful second chambers is admitted on all hands What are the causes of its power? First, compared with other second chambers, like the British House of Lords and the French Senate, it is a small body and therefore more effective Secondly, it is an elected body; this fact gives it authority and vitality Thirdly, it has some special powers in respect of treaties, appointments and impeachments, not possessed by the House of Representatives Fourthly, it is considered the guardian of the rights of the states as states, because of the equal representation given in it to large and small states alike (unlike in the lower House) It is true, as H J Laski has shown, that party lines tend to override state boundaries in the discussions and voting in the Senate, but, nevertheless, the Senate continues to enjoy in popular imagination the dignity arising from its federal character And, finally, its personnel is distinctly better than that of the House of Representatives For one thing, the fact that it has never been renewed at any one time to the extent of more than a third of its membership gives it a tradition of experience and dignity, further, the best Americans, it would seem, prefer to be in the Senate, rather

than in the lower House. The contrast drawn by de Tocqueville a hundred years ago between the Senate and the House of Representatives substantially holds good today as well.

‘On entering the House of Representatives of Washington’, he says,<sup>1</sup> ‘one is struck by the vulgar demeanour of that great assembly. The eye frequently does not discover a man of celebrity within its walls. Its members are almost all obscure individuals. At a few yards’ distance from this spot is the door of the Senate, which contains within a small space a large proportion of the celebrated men of America. Scarcely an individual is to be perceived in it who does not recall the idea of an active and illustrious career. the Senate is composed of eloquent advocates, distinguished generals, wise magistrates, and statesmen of note, whose language would at all times do honour to the most remarkable parliamentary debates of Europe.’

## §5 THE HOUSE OF REPRESENTATIVES

The House of Representatives is composed of 435 members, elected for two years and apportioned among the several states according to their population. This is in contrast to the Senate in which every state has equal representation. The constitution lays down that the number of representatives shall not exceed one for every thirty thousand, but that each state shall have at least one representative. Members are elected for the most part from single-member constituencies.

There is no uniform suffrage law for the House of Representatives (or for the Senate). The constitution provides that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature; and the right to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of servitude, or on account of sex. Within these limits each state regulates the suffrage as it thinks best.

A representative must be twenty-five years or over; he must have been a citizen for at least seven years, he cannot, while a member of the House, hold any ‘office under the United States’; and he must be an inhabitant of that state in which he is chosen. By convention, the representative must also be a resident of the district which he represents.

As in the House of Commons and in the Chamber of Deputies,

<sup>1</sup> A. de Tocqueville, *Democracy in America* (tr. H. Reeve), Vol. I, pp. 205-6

## §6] LAW-MAKING AND FINANCIAL CONTROL

the effective work of the House of Representatives is done through its committees. The committee system saves time and conduces to effective discussion. There are forty-seven 'standing committees' in the House, each devoted to one specific subject, such as banking and currency, agriculture, military affairs, the navy, etc. These committees consist of from two to thirty-five members (the standard number being twenty-one) elected by the House when it first meets after the General Election. Committees are always elected on a party basis, and the majority party sees to it that it has a safe majority on each committee<sup>1</sup>. The chairmen of the committees are also elected by the House. Their position is an important one, for as the Executive has no place in the House, most bills are usually introduced by them, they also pilot them through the House.

In addition to standing committees, the House has its committees of the whole House, at which the Speaker of the House does not preside, but someone named by him. Discussions at these committees are more informal than in the whole House.

### *Its powers*

The House has equal powers with the Senate in ordinary legislation. It has the sole initiative in taxation bills, and has the sole power of impeachment. It shares with the Senate the power to propose amendments to the constitution, and to admit new states into the Union. If in a Presidential election no candidate secures an absolute majority, the House has to choose the President by ballot 'from the persons having the highest numbers not exceeding three on the list of those voted for as President'. It is judge of the elections, returns, and qualifications of its own members.

## §6 LAW-MAKING AND FINANCIAL CONTROL

### *Law-making*

The process of law-making in the U S A is in some respects similar to that employed in Britain and France. Bills are given three readings in one House, referred to committees, reported, debated, considered by the other House and sent to the Execu-

<sup>1</sup> Committees, however, are not always divided between the two parties in exact proportion to their strength in the House. Thus in 1939, though the Republicans constituted only a small minority in the House, they had a substantial minority on each committee. (West, op cit, p 96)

tive head for his signature. But there are important differences arising primarily from the fact that the Executive is a non-parliamentary one.

Let us follow the passage of a public bill introduced in the House of Representatives. 'Introduction' simply means that a member deposits a copy of the bill on the clerk's table or hands it to the Speaker. (Important bills are usually introduced in the names of chairmen of committees) The first 'reading' is, strictly speaking, no 'reading' at all, the bill is deemed to be read by having its title printed in the *Journal* and in the *Congressional Record*. The bill is then referred to the appropriate committee. If the committee so decides there may be public hearings on the bill, persons interested being invited or allowed to appear before the committee to have their say. Then it may report the bill to the House favourably without any change, report it amended, report unfavourably, or not report it at all. If reported, the bill comes up for a second reading, when it is debated, amendments are offered, and a vote is taken. If the vote is affirmative, the bill must in theory be printed before being read a third time. 'As a matter of fact,' W. R. West tells us, 'the House usually assumes that the bill is engrossed<sup>1</sup> and proceeds immediately to the third reading, which is usually by title. However, if some member insists upon a reading in full, the third reading may be delayed until the bill actually has been engrossed, after which it is read in full'. Then comes the final vote on the bill. If the result is favourable, it goes to the Senate, and, after a more or less similar procedure there, to the President. If the House and the Senate cannot agree on the bill, an effort is made to settle their differences by means of a 'committee of conference', i.e. a committee of from three to nine members appointed by each Chamber to explore points of agreement.

Some differences are noticeable between the law-making procedure outlined above and that of the British Parliament. (i) All bills here are introduced by private members, in the British Parliament, most bills are introduced by cabinet members. (ii) The members of the Executive are not present in Congress to guide it in legislation. (iii) The bills are referred to committees before their principles are discussed and approved by the respective Chambers. This method has the advantage that it allows the committees

<sup>1</sup> i.e. printed

## §6] LAW-MAKING AND FINANCIAL CONTROL

greater freedom than is otherwise possible to shape the bill properly, its disadvantage is that after all the labours of the committee, the bill may be rejected by the Chamber on the ground that its principles are not acceptable (iv) There is a larger number of standing committees for the consideration of bills than in the British Parliament, though each individual committee has fewer members, and each committee is devoted to a special subject (v) The Senate in the U. S. A. has greater power than the British House of Lords to amend and reject bills (vi) The President has a suspensive veto, which may in certain circumstances be an absolute veto

### *Financial control*

The Director of the Budget, an official working under the control of the President, prepares the budget more or less on the English plan with estimates of the appropriations necessary for the different departments of Government and a statement of probable revenues. The budget is submitted to Congress on the responsibility of the President. It is considered by two committees of the House of Representatives, viz. the committee on ways and means and the committee on appropriations. These committees report to the House, and later the House debates and passes the Finance Bill and the Appropriation Bill. The bills are then sent to the Senate, and, with any amendments agreed to by the House, to the President.

Two general features are noteworthy (i) There is a lack of unified responsibility in matters of finance, because, though the President submits a unified plan, it is mutilated both in committees and in the Chambers. This is partly because the members of the cabinet and the Director of the Budget are not admitted to the floor of the House to justify and explain their proposals, and partly because the members both in committees and in the Chambers have the freedom (unlike in the British Parliament) not only to reduce items of expenditure and revenue but to propose increases, or even new items (ii) The Senate has much greater power than the British House of Lords to modify revenue and appropriation bills.

The control of Congress over the national finance is effective; perhaps too effective.

## §7 THE JUDICIARY

The judicial system of the U. S. A. is divided into two distinct series of courts individual state courts and the federal courts

The state courts are set up under the state constitutions, and normally concern themselves with cases which involve the adjudication of rights claimed under the state constitutions and the state laws. Judges of the state courts are usually elected by the people for short terms

The federal Judiciary consists of a Supreme Court, ten circuit courts of appeal, forty-eight district courts,<sup>1</sup> a court of claims and a court of customs. The Supreme Court has original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, in other cases, in respect of which the federal courts are assigned jurisdiction, it has appellate jurisdiction 'with such exceptions and under such regulations as Congress shall make'. Judges are appointed by the President, with the advice and consent of the Senate, and serve during good behaviour. They are removable by impeachment. Their salaries may not be diminished during their continuance in office.

The jurisdiction of the federal courts, as defined in the constitution,<sup>2</sup> relates to two types of cases (i) those which concern certain *matters*, and (ii) those which concern certain *parties*.

(i) The first cover all cases in law and equity arising under the national (as distinct from a state) constitution, the laws of the United States, and the treaties made under their authority, and all cases of admiralty and maritime jurisdiction.

(ii) The second cover all cases affecting ambassadors and other public ministers and consuls, controversies to which the United States is a party, controversies between two or more states, 'between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign States, citizens, or subjects'.

The constitution, however, does not say that the cases referred to in (ii) above can be tried *only* by the federal courts. Congress determines by law the *exclusive* jurisdiction of the federal courts,

<sup>1</sup> M. S. Amos, *Lectures on the American Constitution*, p. 32.

<sup>2</sup> Article III.

and in all matters not exclusively assigned to them, the state courts have concurrent jurisdiction. If a state court exercises jurisdiction in such matters, however, the parties concerned have the right of appeal to the federal courts.

### *Relation to the Executive*

(i) The President appoints the federal judges with the consent of the Senate, but he has no power to remove them, since they may be removed only by impeachment. The constitution explicitly says that they serve during good behaviour, their salaries also, fixed at the time of their appointment, may not be diminished during their continuance in office.

(ii) Federal executive officers are liable, as in Britain, to be tried in federal courts on the principle of the rule of law.

### *Relation to the Legislature*

(i) Congress has power to settle the *exclusive* jurisdiction of the federal courts. So far, it has given them exclusive jurisdiction in all suits to which the U S A is a party, in all suits between two states or between a state and a foreign nation, in certain suits arising under the national constitution and national laws such as those relating to patents, copyright and bankruptcy, and in suits against ambassadors or other public ministers (or their servants), and against consuls or vice-consuls.

(ii) Congress has power to establish federal courts inferior to the Supreme Court.

(iii) The consent of the Senate is necessary for the appointment of judges.

(iv) Judges may be removed by impeachment initiated by the House of Representatives before the Senate sitting as a court of impeachment.

(v) The importance of the Judiciary in the U S A arises from the fact that the U S A is a federal State, and there is therefore a division of powers between the states and the Centre. The constitution stands above ordinary laws, and the Judiciary is its guardian. If a law passed by a state Legislature or by the federal Legislature is against the terms of the constitution, it is null and void, and the Judiciary has, as the guardian of the constitution, the power to declare such laws unconstitutional.

We may illustrate (a) *A state law declared unconstitutional*. In 1791 Congress authorized the establishment of the Bank of



the United States, in the face of violent opposition from certain sections of the states. Under its charter, the bank was entitled to operate throughout the Union by means of branches, and it opened a branch at Baltimore in the state of Maryland. In 1818, the Legislature of Maryland imposed a stamp tax on the circulating notes of all banks or branches thereof located in the state and not chartered by it. The Baltimore branch of the federal bank refused to pay the tax. The state sued the cashier of the bank, McCulloch. The Maryland court upheld the law and ordered McCulloch to pay, whereupon the case was taken to the Supreme Court on appeal.<sup>1</sup> The contention on behalf of the state was that the federal Legislature had no power, according to the constitution, to start a bank. The Supreme Court declared that, according to a clause in the constitution (empowering Congress to collect taxes, to borrow money, etc., and to take the necessary steps to put this power into execution), Congress had an *implied* power to start the bank, and, therefore, the state law (the effect of which would have been to drive out the federal bank) was illegal and against the constitution. Chief Justice Marshall said.

‘Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.’

(b) *A federal law declared unconstitutional* In 1916, Congress, with a view to restrict child labour in factories, prohibited inter-state trade in goods made by child labour. It relied upon a clause in the constitution which gave it power to regulate inter-state trade. But this particular law interfered with industry, a matter within the jurisdiction of the states, the Supreme Court felt that it was not proper for Congress to use the commerce power for the purpose of regulating industry, and so declared the law unconstitutional.<sup>2</sup> Again, in 1919, Congress tried to restrict child labour in factories by resorting to its taxing power,

<sup>1</sup> McCulloch v. Maryland (1819)

<sup>2</sup> Hammer v. Dagenhart (1918). It is interesting to note that a later judgement—in United States v. Darby (1941)—reverses the decision in Hammer v. Dagenhart. The Court now held that the commerce power is complete in itself and acknowledges no limitations other than are prescribed in the constitution. ‘The motives and purposes which lead Congress to regulate inter-state commerce are matters for legislative judgement upon the exercise of which the

but the Supreme Court declared that law also null and void. In 1935 the National Industrial Recovery Act passed by Congress in 1933 was declared unconstitutional in so far as it referred to industries within the states<sup>1</sup>

The power of the Supreme Court to declare laws unconstitutional has been used not only to protect the rights of the states and of the Centre against mutual encroachment but also to protect the rights given to citizens by the constitution, and to protect the rights of one department of government against encroachment by another. One example of each will suffice

(i) The city of San Francisco, acting under a Californian law, passed in 1876 an ordinance directing that every male imprisoned in the county gaol should immediately on his arrival have his hair clipped to a uniform length of one inch from the scalp

'The sheriff, having under this ordinance, cut off the queue of a Chinese prisoner, Ho' Ah Kow, was sued for damages by the prisoner, and the court, holding that the ordinance had been passed with a special view to the injury of the Chinese, who then considered the preservation of their queue to be a matter of honour, and that it operated unequally and oppressively upon them, in contravention of the fourteenth amendment to the constitution of the United States, declared the ordinance invalid, and gave judgement against the sheriff'<sup>2</sup>

(ii) A law passed by Congress in 1876 provided that 'postmasters of the first, second, and third class shall be appointed and may be removed by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law'. In 1920 President Wilson, without consulting the Senate, removed from office Myers, first-class postmaster at Portland, whom he had appointed in 1917 for four years. Myers prosecuted the case first in the court of claims, and later in the Supreme Court. The Court upheld the President's unfettered power of removal, and declared the law (which had made the Senate's consent necessary for removal from office) unconstitutional<sup>3</sup>

The Supreme Court has served two useful purposes in the government of the U. S. A

constitution places no restriction and over which the Courts are given no control'

<sup>1</sup> *Schechter Poultry Corporation v U S* (1935)

<sup>2</sup> Bryce, *The American Commonwealth*, Vol I, p 330

<sup>3</sup> *Myers v U S* (1926)

(i) It has acted, as illustrated above, as the guardian of the constitution, to protect the rights of the states against invasion by the Centre and vice versa, the rights of individuals against invasion by the Centre and the states, and the rights of the Executive against invasion by the Legislature.

(ii) It has permitted the constitution to develop by adapting the provisions of an eighteenth century constitution to meet the vastly different conditions and needs of later years (the adaptation is not yet complete, but that is primarily the work of the amending body of the constitution), and, incidentally, helped to increase the powers of the Centre by laying down the doctrine of implied powers. Thus the power to charter a federal bank proceeded from such powers as the power to collect taxes, to borrow money and to regulate the value thereof. The power to issue paper money was derived from the power to borrow money, and to regulate the value thereof, and other such powers. The constitution lays down that Congress shall have the power to regulate commerce with foreign nations and among the several states. 'The Supreme Court has upheld as within the scope of this clause acts passed by Congress pertaining to the regulation of inter-state and foreign commerce by steamboat, by railway, by telegraphy, by airplane, and by radio. These means of communication were unheard of in 1787.'<sup>1</sup> Not only can the national Government regulate commerce, but it has the right to engage in inter-state commerce and to create and control companies for the construction and operation of highways, bridges, canals, and railways. Indeed, judicial construction, more than any other single factor, has been responsible for the enormous increase in the power of the national Government today.

## §8 THE PARTY SYSTEM

The earliest party division in the U S A was between the Federalists and the Jeffersonian Republicans, the former were in favour of making the Federal Government strong by interpreting the constitution liberally in its favour, the latter were champions of state rights. Till 1800, the Federalists had the upper hand, though Washington (the first President) himself was not a party man and indeed denounced all parties. With the election of Jefferson (the leader of the Republicans) to the Presidency

<sup>1</sup> West, *op cit*, p. 63

in 1800, the Republicans came to power ; the Federalists gradually declined in importance, and by 1816 had ceased to exist. From 1816-30 there were no definitely marked national parties, so the period is generally known as the 'era of good feeling', but was really 'an era of particularly bad feeling, based on personal rivalries',<sup>1</sup> small groups following the lead of men like Adams, Clay, Jackson and Calhoun. In the forties a realignment of parties into Whigs and Democrats is noticeable. The former stood for protection in industry, the establishment of a national bank and a generally positive policy of social improvement by State action. The latter stood for extreme individualism and the extension of the suffrage. In the fifties and sixties, the issue of slavery overshadowed all other questions. Those who opposed slavery came to be known as the Republicans, those who supported it, the Democrats. The Civil War (1861-5) resulted in the abolition of slavery. The two parties, the Republicans and the Democrats, however, continued to exist,<sup>2</sup> but their evolution during the past sixty years 'has rather taken the form of a consolidation of party structure than a collective adherence to any single principle or policy'. Each party draws up its platform according to circumstances and chiefly with an eye to political success. There is a difference rather in emphasis on certain ways of doing things than in fundamentals. Thus the Democratic Party platform in 1940 in respect of foreign policy was as follows

'The American people are determined that the war raging in Europe, Asia and Africa shall not come to America

'We will not participate in foreign wars nor send the Army, the Navy and the Air Force to fight outside the Americas except in case of attack

'We must be so strong that no possible combination of Powers would dare attack us. We propose to provide America with an invincible air force and navy strong enough to defend all our coasts and national interests and a fully equipped mechanized army together with the necessary expansion of industrial production

'We have seen the downfall of nations accomplished through internal dissension provoked from without. We denounce and will do all in our power to destroy the treasonable activities of disguised anti-democratic and un-American agencies

'In self-defence and good conscience, the world's greatest

<sup>1</sup> West, *op. cit.*, pp. 439-40

<sup>2</sup> There have also been other minor parties like the Prohibition party, the Populists, the Socialists, etc.

democracy cannot afford heartlessly or in a spirit of appeasement to ignore peace-loving and liberty-loving peoples wantonly attacked by ruthless aggressors. We pledge ourselves to extend to these peoples all the material aid at our command, consistent with law and not inconsistent with the interests of our national self-defence—all to the end that peace and international good faith may yet emerge triumphant.

The Republican programme<sup>1</sup> differs but little from the one outlined above, except that it is a little more emphatic in opposing 'American involvement in foreign wars', and in condemning 'Executive activities that might lead to war, without approval of Congress', it also 'favours aid compatible with international law to nations "fighting for liberty"'.

The divergence is perhaps a little more marked in respect of internal policy, though here also there is a large measure of agreement. Thus in order to provide social security, the Democrats promise the steady expansion of the Social Security Act to cover groups not now protected, and favour larger and more uniform benefits in all categories and a minimum pension for those unemployed who reach the retirement age. The Republicans want 'necessary' old-age benefits, and the extension of unemployment insurance to groups not now covered 'wherever practicable'. The Democrats defend the right of Labour to bargain collectively. But also 'the Republican Party has always protected the American worker', and supports the right of Labour to 'organize and bargain collectively, and so on. The major difference comes out in respect of government regulation of business, and of unemployment relief. The Democrats favour greater State interference with business and greater State responsibility to provide work for the needy jobless, the Republicans favour more freedom for business 'while promising enforcement of the anti-trust laws' and stand on the principle that the encouragement of free enterprise and the removal of administrative restrictions on business will automatically lead to the absorption of the jobless by private industry.

The party system in the U. S. A. is instructive to the student of Politics mainly for its thoroughgoing organization. This is explained by two sets of causes, general and particular. The general causes are that parties fulfil some necessary functions in public life and enable democracy to work. Out of the several

<sup>1</sup> *The New Republic*, 7 October 1940

social problems which call for solution, they select what they consider the most urgent, work out solutions and present them to the electorate, serve as agencies of political education, select candidates; and establish a continuing and collective responsibility. The causes particular to the U S A are threefold (i) the frequent popular elections in the country not only to the Legislature but to administrative and judicial posts, (ii) the gap between the Executive and the Legislature, (iii) the large extent of territory to be covered. The more thorough the organization the greater the chances for parties to succeed in the elections, and the greater the opportunity for the winning party in the Presidential election to influence the Legislature to carry out its programme

### *The Primary and the Conventions*

Until recently, party organization throughout the U S. A. was more or less uniform. The foundation of party structure was the Primary in the smallest electoral area, town, county, city ward, as the case might be. The Primary was a meeting of all the qualified party voters in that area. It selected party candidates for the elective offices in the locality, chose delegates to sit in a party convention for some larger election area, such as a city convention, and appointed a party committee to attend to local party work.

The Convention was for a larger electoral area (a city or a district) what the Primary was for the smallest electoral area, with the essential difference that it consisted of *delegates* from Primaries, not of all qualified party voters. It selected party candidates for elective offices within the area of its jurisdiction, chose delegates for the state convention, and appointed a committee for party work in its area.

Finally, there was the National Convention for each party composed of delegates from state conventions, it selected the party candidate for the Presidency, approved of the party platform, and appointed a national committee to organize the Presidential campaign.

In actual working, the system gave rise to many abuses, primarily because the conditions which were necessary for its success were rarely present. The conditions assumed were that all good citizens would attend the Primary, that they would choose the

best among them to represent them in the Conventions as well as for the various offices, and that the best men would offer themselves for election to these offices. As it was, a few party leaders in effect controlled the Primary, and got their friends and themselves elected. The 'boss' or party leader and the 'ring', i.e. the select friends and followers of the 'boss', formed a sort of oligarchic caucus who got a subservient Primary to act much as they dictated. The preparation of the roll of party members, and the conduct of Primary meetings left much to be desired, fraud, intimidation, and force were frequently employed by the 'boss' and the 'ring' to get things done in their own way. The better sort of citizens stayed away from the dirty game of politics.

### *Recent changes*

In recent years strenuous attempts have been made in most states to put an end to abuses. The details vary from state to state; broadly speaking, it may be said, the rules are aimed at the prevention of bribery and fraud in the preparation of party rolls, and of violence at the Direct Primary election. In many states the intermediate conventions have been abolished, the Direct Primary (as it is now called) being allowed not only to elect the local party committee and candidates for local elections but to choose candidates directly for local, district and state offices. The National Convention and the national committee are of course retained. The Direct Primary is also used in many states for selecting delegates to the National Convention.

### §9 HOW THE CONSTITUTION HAS DEVELOPED

The constitution of the U S A has now been outlined; it remains to summarize the various factors that have contributed to its development to its present form from the original of 1787. These are set out under the four following heads.

(1) *Formal amendment* The method of amendment provided by the constitution has already been described. Of the twenty-one amendments effected through this process the most important are (a) the inclusion in the constitution of a list of fundamental rights of individuals, such as freedom of religion, of speech and of the press, and the rights of the people peaceably to assemble, to keep and bear arms, to be secure in their persons, houses, papers and the like and to trial by jury (b) the aboli-

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tion of slavery, (c) the direct election of senators, and (d) the adoption of woman suffrage

(ii) *Judicial interpretation*<sup>1</sup> This has helped the constitution to adjust itself more or less to changing conditions, and virtually widened the actual powers of the Centre, carrying them beyond what the framers could have foreseen

(iii) *Usages* As in Britain, constitutional usages have played an important part in developing the constitution. Thus the constitution provides that the President shall be elected by an electoral college; the intention of the constitution-makers clearly was that the electors should have discretion in voting for the President. In practice, the electors vote according to their 'mandate', so the election is in effect direct. Other usages are (a) Cabinet ministers are prevented from speaking or being present on the floor of either House of Congress, but the embargo does not extend to their appearance before the committees of Congress. (b) The initiative in appointments is taken by the President and not by the Senate. (c) Normally the Senate does not refuse consent to the President's choice of the personnel of his cabinet. (d) If the senators from the state in which the office lies agree to an appointment made by the President, the Senate confirms it, otherwise not. (e) Appropriation bills also usually originate in the House of Representatives. (f) Usage prohibits anyone from seeking to represent in Congress a 'district' in which he does not reside.

The general tendency of the body of usage that has grown up has been in the direction of a greater and more direct popular control of the Government, to make the American political system more democratic than it was at the beginning or than it was originally intended or expected to be.<sup>2</sup> The leading example, of course, is the revolutionary change made in the system of electing the President both in the restriction of the choice of presidential electors to the method of popular vote and in the forfeiture by the electors themselves of the power to do anything more than register the popular will. Some conventions, like the one permitting heads of departments to appear before the committees of Congress, have served to fill the gap between the Legislature and the Executive.

<sup>1</sup> See above, §7 for illustrations

<sup>2</sup> H. W. Horwill, *The Usages of the American Constitution*, p. 210



(iv) *Development by law.* The constitution has left many details to be worked out by the state Legislatures and by Congress. Thus the method by which members of Congress are nominated and the qualifications of voters are left to be decided by the laws of the various states. The structure of the subordinate federal courts and the organization of the various executive departments, and the succession to the Presidency in case of 'removal, death, resignation, or inability, both of the President and Vice-President'—these are regulated by the laws of Congress.

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## CHAPTER XIX

# THE DOMINIONS

### §1 THE DOMINION OF CANADA

Canada was founded in 1608 as a French colony. The colony passed by conquest under British rule in 1760 (though formally ceded to Britain only in 1763 by the Treaty of Paris) and was administered as a unitary State until 1867. Its present constitution dates from that year when the British North America Act was passed, uniting the then existing four provinces into a federation entitled the Dominion of Canada. The number of provinces has since increased to nine.

The constitution can be amended by the king-in-Parliament of Britain on an address presented by both Houses of the Dominion Parliament to His Majesty the king. By convention the imperial Parliament does not refuse to make an amendment which is supported by a substantial body of opinion in Canada. Where, however, an amendment proposed by the Dominion Parliament is opposed by one or more of the provincial Legislatures,<sup>1</sup> the position is one of extreme delicacy and the chances are that imperial legislation would be refused.

The principle of the division of powers in Canada between the Dominion and the units is, broadly speaking, the opposite of that adopted in the U. S. A., i.e. the powers of the provinces are enumerated, and the residue is left with the Dominion. A general provision in the constitution, however, provides that matters of a purely local nature are within the sphere of provincial legislation. Twenty-nine powers are specifically enumerated as being outside the scope of such legislation, i.e. as being beyond all doubt matters central.

Among the important federal subjects are trade and commerce, postal service, the militia, naval and military services, and defence, navigation and shipping, currency and coinage, banking, naturalization and the treatment of aliens, marriage

<sup>1</sup> An amendment adopted in 1907 to vary the then existing state of subsidies received by the provinces from the Dominion was based on the assent of all the provinces, this precedent has been held to be binding. See A. B. Keith, *The Constitutional Law of the British Dominions*, p. 109.

and divorce ; criminal law and procedure To the provinces are assigned, among other things, the amendment of their constitutions (except as regards the office of Lieutenant-Governor) ; municipal institutions, hospitals, asylums and like bodies , local works and undertakings (with exceptions) , property and civil rights in the province and the administration of justice Both the Dominion and the provinces can pass laws dealing with agriculture and immigration , but the federal law will prevail over that of a province in case the two clash

### *The Executive*

The executive government is carried on in the name of the king The functions of the Crown are partly performed by the king himself and partly by his representative, the Governor-General , but they both act on the advice of the Dominion ministers

The king possesses the power to appoint and dismiss the Governor-General , by means of Orders in Council to decide on bills reserved by the Governor-General for his assent ; to disallow Acts , and to award titles to residents in the Dominion In respect of external affairs, he has power to declare war or neutrality, to make peace and to accredit envoys to foreign States

The Governor-General is appointed, normally for five years, by the king on the advice of the prime minister of Canada Because accusations of partisanship would be inevitable if local men were chosen, the prime minister invariably recommends the names of distinguished public men from Britain for the post The Governor-General, like the king whom he represents, is a constitutional head , his history, like that of his illustrious prototype, has been a steady, unsensational rather reluctant progress from virtual dictatorship to virtual impotence<sup>1</sup> He summons, prorogues, and dissolves Parliament , assents to, withholds his assent from, or reserves for His Majesty's pleasure any bill that has been passed by the Parliament of the Dominion or of the provinces , is commander-in-chief , constitutes and appoints, in the king's name and on his behalf, ' all such judges, commissioners, justices of the peace and other necessary officers and ministers (of Canada) as may be lawfully constituted or appointed ',<sup>2</sup>

<sup>1</sup> R. M. Dawson *Constitutional Issues in Canada*, p. 65

<sup>2</sup> *Letters Patent*, 1931 (as amended, 1935).

and removes them, appoints the Lieutenant-Governors of the provinces (with the concurrence of his Privy Council<sup>1</sup>) and may remove them, and has the power of pardon<sup>2</sup> By convention, however, he must exercise all his powers on the advice of ministers who are virtually responsible to Parliament for their advice, the ministers being bound (also by convention) to accord to him the same treatment as regards consultation and information as is accorded to the king in Britain

The Governor-General is not a viceroy This fact is of some significance from the legal point of view he is liable to the courts both civilly and criminally for any acts done in his private or his public capacity if these acts are illegal<sup>3</sup>

The real Executive of the State is a cabinet of ministers chosen, as in Britain, from the party which commands a majority in the elected House of Parliament Appointments are formally made by the Governor-General on the recommendation of the prime minister, by convention, representation is given in the cabinet, as far as possible, to all the provinces The Canadian cabinet resembles the British cabinet in all essential particulars—the exclusion of the Governor-General from its meetings, political homogeneity, joint responsibility, responsibility to Parliament, and the ascendancy of the prime minister In addition to their executive duties, the ministers, like their British counterparts, have important work in connexion with legislation They initiate most of the important bills in the Legislature and supply effective guidance and leadership to it

### *The Legislature*

The Dominion Parliament consists of the king represented by the Governor-General, the Senate, and the House of Commons

The Senate of Canada, like that of Italy, is a nominated body It consists of 96 members nominated for life by the Governor-General on the advice of the cabinet The 96 members are distributed as follows —Ontario, 24, Quebec, 24, the Mari-

<sup>1</sup> The name of the Executive Council in Canada

<sup>2</sup> It may be mentioned that, in exercising his power of pardon, the Governor-General is directed by the Instrument of Instructions issued to him on his appointment to receive the advice of the Privy Council in respect of capital cases, and in other cases the advice of one, at least, of his ministers, and in any case in which such pardon might directly affect the interests of the Empire, or any other country, he is instructed to take those interests *into his own personal consideration* in conjunction with the advice mentioned above

<sup>3</sup> Keith, *The Dominions as Sovereign States*, p. 214

time Provinces and Prince Edward Island, 24;<sup>1</sup> the Western Provinces, 24.<sup>2</sup> The Governor-General may add<sup>3</sup> four or eight members (representing equally the four divisions of Canada) in order primarily to overcome deadlocks between the two chambers. It is noteworthy that, unlike the U. S. A. and Swiss upper Houses, the Canadian Senate does not accord equal representation to the component units of the federation. A senator must have attained the age of thirty years. He must be a British subject (natural-born or naturalized) and resident within the province for which he is appointed. Finally, he must possess land or tenements worth 4,000 dollars, and own property exceeding by the same amount his debts and liabilities. Appointments are, as a rule, made on purely party lines.

According to law, the Senate has equal powers with the lower House in ordinary laws, and somewhat inferior powers in regard to financial bills, these having to originate in the lower House. It may apparently amend and reject the latter class of bills.<sup>4</sup> The actual influence exercised by it naturally varies with the Government in power.

'The purely partisan character of the Senate has resulted in the rule that it accepts the legislation of the party without serious dissent, and that it attacks, when there is a change of regime, the legislation sent up to it with a vigour which dies away as the members, usually old, die off and are replaced by nominees of the new Government.'<sup>5</sup>

It is clear, moreover, that, being a nominated chamber, it lacks the authority which a popular chamber may claim; indeed, it has been doubted<sup>6</sup> whether it commands even its own confidence!

The lower House, the House of Commons, is composed of 245 elected members. The number of representatives of Quebec is fixed at 65 and that of every other province at 'such a number of members as will bear the same proportion to the number of its population (ascertained by the census) as the number 65 bears

<sup>1</sup> Nova Scotia, 10. New Brunswick, 10. Prince Edward Island, 4.

<sup>2</sup> Manitoba, Alberta, Saskatchewan and British Columbia, 6 each.

<sup>3</sup> If on the recommendation of the Governor-General, the king thinks fit to direct.

<sup>4</sup> See however W. P. M. Kennedy, *The Constitution of Canada*, p. 385. 'Theoretically it may reject a finance bill, but can make no amendments to it.'

<sup>5</sup> Kluth, *The Dominions as Sovereign States*, p. 299.

<sup>6</sup> Laski, *A Grammar of Politics*, p. 329.

to the population of Quebec so ascertained.' The right to vote is generally given to all British subjects, irrespective of sex, of 21 years and above, who have resided for one year in Canada and for a shorter period in the electoral district. Subject to the usual disqualifications of unsoundness of mind and conviction for crime, the rule is that no person is entitled to vote unless he is also permitted to vote at provincial elections<sup>1</sup> For example, British Indians, Chinese and Japanese in British Columbia, having no vote for provincial elections, can have no Dominion franchise The term of the House is five years, unless it is sooner dissolved by the Governor-General

The Canadian House of Commons performs more or less the same functions as its British counterpart it passes laws, controls finance, controls the Executive, gives expression to public grievances and needs, and serves as an arena wherein future leaders may distinguish themselves It is (at any rate in theory) not so powerful as the English House in so far as it is limited by a written constitution, by the possibility that the laws passed by it may be declared *ultra vires*, and by matters reserved for the provinces, on which it cannot legislate

### *The Judiciary*

Power has been given to the Dominion<sup>2</sup> to provide for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada. As it is, however, there are only two federal courts, the Supreme Court (established in 1875) and the court of exchequer and admiralty All other courts in the land are provincial courts, which, however, may hear disputes relating to federal as well as provincial law.

Judges of the superior, district and county courts (with a few exceptions) are appointed by the Governor-General, normally, they are selected from the bar of the province concerned Their salaries, allowances and pensions are fixed and provided by the Parliament of Canada The constitution also states that the judges of the superior courts shall hold office during good

<sup>1</sup> One important exception to this rule is that in Quebec women have no right to vote for provincial elections, while they vote at federal elections

<sup>2</sup> Section 101

behaviour, but may be removed by the Governor-General on address of the Senate and the House of Commons

The Supreme Court of Canada is in some respects more powerful than the Supreme Court of the U S A , for it can hear appeals from provincial courts on purely provincial law. But really it is less powerful than that Court for three reasons: its decisions are not necessarily final appeals being permissible from it to the Privy Council, <sup>1</sup> appeals may be made direct from a provincial court to the Privy Council, though this latter body generally discourages such direct appeals, <sup>2</sup> its power to interpret the constitution is considerably reduced by the fact that the Governor-General of Canada is vested with the power of disallowing provincial bills

## §2 THE COMMONWEALTH OF AUSTRALIA

Australia is a federal State composed of six states. The present constitution is based primarily on the Commonwealth of Australia Constitution Act, passed by the British Parliament in 1900. Prior to the passing of that Act, Australia consisted of six provinces, New South Wales, Tasmania, Victoria, Queensland, South Australia and Western Australia, each with its own government and following its own policy in regard to economic and political matters. The absence of a common fiscal policy led to grave inconveniences. This, together with the need for a common defence policy, gave rise in the latter half of the nineteenth century to a movement in favour of the establishment of a common government, and led to the passing of the Commonwealth of Australia Act <sup>3</sup>

The constitution is, as in other federal States, a rigid one. An amendment passed by an absolute majority of each House of Parliament must be submitted in each state to the electors qualified to vote for the election of members to the House of Representatives <sup>4</sup> (If any such law is passed by one House and rejected by the other and is passed a second time by the initiating House after an interval of three months, the Governor-General *may* refer the law to the electors of the House of

<sup>1</sup> Since 1933, appeals to the Privy Council in criminal cases have not been permitted

<sup>2</sup> Keith, *The Dominions as Sovereign States*, p. 452

<sup>3</sup> The Act came into effect from 1 January 1901

<sup>4</sup> The lower House of the Commonwealth Parliament

## §2 ] THE COMMONWEALTH OF AUSTRALIA

Representatives) If then it is accepted by a majority of the electors in a majority of states and by a majority of the total number of voters, it becomes law Amendments which propose to diminish the proportionate representation of any state in either House of Parliament or the minimum number of representatives of a state in the House of Representatives, or to alter the territorial limits of any state, shall not, however, become law unless the majority of the electors voting in that state approve them

The principle followed in Australia in respect of the division of powers between the Federal Government and the states resembles in the main that followed in Switzerland and the U S A (i) The powers of the Federal Government are enumerated (some being exclusively federal and others concurrent), (ii) the residue is left with the states, and (iii) there are some prohibitions on the Federal Government and on the states

The *exclusive* powers of the Federal Government include the power 'to make laws for the peace, order, and good government of the Commonwealth with respect to the seat of government' Other matters declared to be exclusively federal are naval and military affairs, and coinage<sup>1</sup> The *concurrent* subjects include foreign and inter-state trade, postal, telegraphic, telephonic, and other like services, census and statistics, banking and insurance, other than state banking and state insurance, weights and measures, bills of exchange, copyrights, naturalization, marriage and divorce, immigration and emigration, and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state As elsewhere, when any law of a state is inconsistent with any law of the Commonwealth on a concurrent subject, the latter prevails.

Examples of prohibitions on the Commonwealth are that it shall not, by any law or regulation of trade, commerce, or revenue give preference to one state over another, it shall not abridge the right of a state or its residents to the reasonable use of the waters of its rivers for conservation or irrigation Prohibitions on the states include the issuing of coinage and the raising of military or naval forces

### *The Executive*

The executive government is carried on in the name of the

<sup>1</sup> Sections 114 and 115



king. The functions of the Crown are performed, as in Canada, partly by the king himself and partly by the Governor-General, both acting on the advice of ministers responsible to the Australian Parliament.

The Governor-General occupies the same position and exercises more or less the same powers as his counterpart in Canada, the only differences in law being the following. The appointment and dismissal of all officers of the executive government (except the ministers) in Australia are vested in the Governor-General in Council, whereas in Canada they are vested in the Governor-General. The Governor-General of Australia has no power to appoint the Governors of the states, their appointment being vested in the king. Finally, he has no power to veto the laws passed by the Legislatures of the states.

The ministry resembles in all essentials that of Canada. Ministers are styled Ministers of State and appointed to the Federal Executive Council, which, however, may contain other Executive Councillors called honorary ministers<sup>1</sup>.

### *The Legislature*

The Parliament of the Commonwealth consists of the king represented by the Governor-General, the Senate, and the House of Representatives.

The Senate is constituted, as in the U. S. A. and Switzerland, on a truly federal basis. It consists of 36 members, six from each component state. Members are elected (on the basis of universal suffrage<sup>2</sup>) by the whole of each state voting as an undivided constituency on the system of preferential voting<sup>3</sup>. Any person over the age of twenty-one, if a natural-born subject or naturalized for at least five years, who has resided within the Commonwealth for three years, is eligible for election. The term of the Senate is six years, one-half retiring every three years.

It has equal powers with the House of Representatives except with regard to money bills, which may originate only in the

<sup>1</sup> E. Salant, *An Outline of the Constitutional Laws of the British Empire*, p. 49.

<sup>2</sup> There is no uniform franchise law for the whole Commonwealth, but the existing provisions in practice amount to universal suffrage with some exceptions.

<sup>3</sup> A system of voting in which the voter is allowed to mark his preferences for candidates, see p. 475 below for an explanation.

latter body. The Senate also has no power to amend a money bill, it may, however, reject it, or, if unwilling to take this extreme step which may provoke a first-class political crisis, return it to the House of Representatives with suggestions of amendment for its consideration. To overcome deadlocks between the two Houses it is provided<sup>1</sup> that if a bill is rejected twice (with an interval of three months) by the Senate, the Governor-General may dissolve both the Houses simultaneously; and if the newly elected Houses also disagree, the bill may be laid before a joint session, an absolute majority of the total number of both Houses decides the issue. Though the law is silent on the relative powers of the Senate and the House of Representatives in respect of the control of the Executive, it has been well established by usage that the ministry is responsible to the lower House, the Senate does not attempt to turn it out.

In estimating the utility of the Senate in the constitution from its record of work, it is sufficient to say that it has not fulfilled the expectations of its founders. It was intended to be a body of talented legislators which could not only revise the laws passed by the lower House, but which might, on account of its federal basis, guard the rights of the smaller states against invasion by the larger. But it has not been able to attract talent, the better sort of politician preferring the more powerful lower House, and state-loyalties have rarely influenced its deliberations or divisions. Moreover, up to 1919 it hardly served as a moderating influence in ordinary legislation, the Labour Party having had considerable strength in it. Since that date it has been more active in this direction.

The House of Representatives consists of 75 elected members,<sup>2</sup> the number of seats being allocated to the various states periodically on the basis of population. The constitutional provisions are that the number of members shall be as nearly as practicable twice the number of senators, and no state may have less than five. The total number is distributed, for the most part, in single-member constituencies. The rules governing the qualifications of the voters and the members are as for the Senate.

<sup>1</sup> This provision has been used only once, in 1914.

<sup>2</sup> One member, representing the Northern Territory, has no vote except on certain specified matters. See Keith, *The Dominions as Sovereign States*, p. 288 and n. 1.

The term is three years, unless the House is dissolved earlier by the Governor-General.

Its functions, broadly speaking, correspond to those of the House of Commons in Britain, with two important restrictions (i) In Australia, a federal State, the House can consider legislation only in respect of the subjects allotted to the Commonwealth. (ii) Its powers in respect of constitutional amendment are limited. It is also limited, more than the House of Commons is, by the upper Chamber which has greater powers as compared with the House of Lords.

### *The Judiciary*

The judicial power of the Commonwealth is vested in the High Court of Australia and in such other federal courts as the Parliament creates or invests with federal jurisdiction. Judges are appointed by the Governor-General in Council. Their salaries are fixed and may not be diminished during their continuance in office. They may be removed from office on the ground of proved misbehaviour or incapacity, but even then only on an address to the Governor-General from both Houses of Parliament in the same session.

The High Court, in the main, occupies the same position in Australia as a guardian of the constitution as the Supreme Court does in the U. S. A. There are two differences (i) Appeals may be carried (subject to specified conditions<sup>1</sup>) from its decisions to the Judicial Committee of the Privy Council, whereas there is no appeal from the decisions of the Supreme Court of the U. S. A. (ii) The High Court may hear appeals from the Supreme Courts of the states on purely state law, the Supreme Court of the U. S. A. cannot entertain such appeals.

### *Comparison with Canada*

This survey leaves little doubt that Australia is more truly federal than Canada. The residuary powers here are with the units, not with the Centre; the Governors of states are not appointed by the Governor-General of the Commonwealth, the laws passed by states cannot be vetoed by the Governor-General, the upper House of the Legislature has a more truly federal basis with equality of representation for the units, and in

<sup>1</sup> Section 74

practice enjoys greater powers than the Senate of Canada; the Judiciary is more truly federal in the sense that it has larger powers of interpretation than its Canadian counterpart, and, lastly, the states have a definite place given to them in the amendment of the constitution, the consent of a majority of states being required for such amendment

The explanation of this difference is twofold (1) Canada was originally a unitary State, converted into a federation by the component provinces being made autonomous units of the new federation, and the federal constitution was 'to a great extent drafted by men who were in favour of a legislative union'.<sup>1</sup> The Australian federation was formed by the union of originally independent units and was drafted by men who believed as much in 'state rights' as in the utility of a common government (2) The atmosphere in which the Canadian federal scheme was mooted (1864-7) 'was such as to incline its authors towards centralization' The civil war in America (1861-5) was fresh in the minds of all and had made many doubt the wisdom of emphasizing 'state rights'; and it was thought necessary, in order to prevent the disruption of the State, to strengthen the Centre as against the provinces

### §3 THE UNION OF SOUTH AFRICA

South Africa is called, in the South Africa Act, 1909,<sup>2</sup> a *legislative union* of four provinces, the Cape of Good Hope, Natal, Transvaal, and Orange Free State A reading of the constitution suggests, however, that in all essentials the 'legislative union' is much the same thing as a unitary State, the federal elements in it being relatively insignificant

The outstanding characteristic of a unitary state is the dependence of the provinces (or local bodies, by whatever name they are called) on the central Government for the exercise of their legislative and administrative powers In a federation, on the other hand, there is a division of governmental powers between the central Government and the component states (or provinces), each being free to pass laws and administer them in respect of the subjects assigned to it, and the division being made by a constitution which the central Government is powerless to alter The supremacy of the constitution, as distinguished from that

<sup>1</sup> H E Egerton, *Federations and Unions within the British Empire*, p 39  
<sup>2</sup> Section 4

of the central Government, is therefore essential to a federation. Generally, too, in federations the component units are treated on a basis of equality, being given equal representation in the federal upper House, and, as far as possible, in the federal cabinet.

The federal elements in the South African constitution are (i) The provinces are allotted equal representation in the Union Senate, each being assigned eight members. (ii) In practice, the Union cabinet is constructed with regard to the need for representing, as far as practicable, all the provinces. (iii) The provinces have also 'received recognition in the allocation of federal business'. Pretoria in Transvaal is the administrative capital, Cape Town, the seat of Parliament; and Bloemfontein in Orange Free State, the headquarters of the Supreme Court, Appellate Division. (iv) Above all, there are certain matters, on which, by the constitution, the provincial Legislatures can make laws, 'ordinances' as they are termed. Examples are direct taxation within the province; education other than higher education, agriculture (subject to conditions defined by the Union Parliament); hospitals and charitable institutions, municipal institutions, local works and undertakings within the province; roads, markets, fish and game preservation; and, generally, all matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature or in respect of which the Union Parliament delegates to the provinces the power to make ordinances.

But, in spite of these, South Africa is in essence a unitary State because (i) though the provinces are assigned certain subjects, the Union can also legislate on them, overriding provincial ordinances, the provincial ordinances require for their validity the assent of the Governor-General in Council, and a provincial ordinance is null and void if it is repugnant to any Act of the Union Parliament. (ii) The chief executive officer of the province, styled the Administrator, is appointed by the Governor-General in Council; and the conditions of appointment, tenure of office and retirement of public officers within the province may be regulated by the Union Parliament. (iii) With the exception of certain provisions of the Act, the Union Parliament may amend the constitution by a simple act of legislation in the same way as it may amend ordinary laws. Moreover, the excep-

tions themselves (amending the constitution, safeguarding the Cape native franchise, and providing for the equal treatment of the English and Dutch languages) are subject to amendment by the Parliament provided the amendment is passed by both Houses of Parliament sitting together, and at the third reading is agreed to by not less than two-thirds of the total number of members of both Houses. In either case, the consent of the provinces is not required for such amendment (iv) Legally, it is open to the Union Parliament even to abolish the provincial Legislatures or reduce their powers. It is significant that the only safeguard provided in the Act of 1909 against such drastic exercise of power (viz. that a bill proposing such an abolition or reduction should be reserved for the king's pleasure) was repealed in 1934.<sup>1</sup>

### *The Executive*

The executive government is carried on, as in Canada and Australia, in the name of the king, the functions of the Crown being performed partly by the king himself and partly by the Governor-General, both acting on the advice of ministers responsible to the Union Parliament.

The Governor-General occupies the same position and exercises more or less the same powers as his counterparts in Canada and Australia. As in Australia, the appointment and dismissal of all officers of the executive government (except the ministers) are by law vested in the Governor-General in Council. The Governor-General in Council has (as the Governor-General has in Canada) the power to appoint the executive heads of the provinces (here called Administrators), and to veto provincial ordinances.

The ministry is a parliamentary Executive resembling that of Canada.

### *The Legislature*

The Legislature of the Union consists of the king, represented by the Governor-General, the Senate and the House of Assembly.

<sup>1</sup> The provinces, however, were consoled by the passing of Act No. 45 of 1934, under which Parliament was not to abolish any provincial Council or abridge their powers save on the petition to Parliament of the Council affected. Keith, *The Dominions as Sovereign States*, p. 68.

The Senate consists of 40 members, eight from each of the four provinces and an additional eight nominated by the Governor-General in Council for ten years. Half the nominated members are to be selected for their thorough acquaintance 'with the reasonable wants and wishes of the coloured races in South Africa'. The senators from the provinces are chosen by indirect election, the members of the Assembly for the province sitting in joint session with the Provincial Council (presided over by the Administrator) and voting on the system of proportional representation with a single transferable vote. A senator must be at least thirty years old, a British subject of European descent, and resident in the Union for five years; the elected members must, besides, own land to the value of at least £500. The normal term of a Senate is ten years; it may be dissolved by the Governor-General earlier.

The Senate has, in law, equal powers with those of the House of Assembly in respect of ordinary bills, and inferior powers in respect of money bills. It may not originate or amend money bills, nor any bill so as to increase any proposed charges or burden on the people.

If a bill other than a money bill is passed by the House of Assembly in two successive sessions and is twice rejected by the Senate (or passed by it with amendments to which the House of Assembly will not agree), the Governor-General may convene a joint session, at which it will be deemed to be passed if it secures the absolute majority of the total number of the members present. Where the disagreement is on a money bill, the Governor-General may summon a joint sitting 'during the same session in which the Senate so rejects or fails to pass such bill'.<sup>1</sup> As the number of members in the lower House is nearly four times that of the Senate, normally the will of that House is likely to prevail in a joint session.

On the whole, according to Keith, the Senate has proved to be of no great importance. 'It was not intended to be more than a house of review, and in that capacity it serves fairly well. But it does not attract talent'.<sup>2</sup>

The House of Assembly consists of 153 members, of these 150 are distributed among the provinces on the basis of population, and three are reserved for the representation of Africans.

<sup>1</sup> Section 63

<sup>2</sup> *The Dominions as Sovereign States*, p. 304

in the Cape of Good Hope<sup>1</sup> The right to vote for the election of the first 150 is given to all adult whites, without any property or other qualification The right to vote for the election of the three members to represent the Africans is, in the Cape of Good Hope, given to all African males who are able to read and write their name, address, and occupation, who have for twelve months occupied property worth £75 in the registration district, or who have resided for three months in the Cape and earn £50 a year<sup>2</sup> Only Union nationals of European descent, who have resided five years in the Union and are qualified as registered voters, are eligible for membership The House of Assembly sits for five years from the date of its first meeting unless dissolved sooner

### *The Judiciary*

The judicial system has at its apex the Supreme Court with its two Divisions Provincial Divisions, one in each of the four provinces,<sup>3</sup> and an Appellate Division Judges are appointed by the Governor-General in Council As elsewhere, the rule exists that their salaries may not be diminished during their continuance in office, and that they may not be removed from office except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity

The Supreme Court has hardly any power to interpret the constitution, nor is such power essential in what is practically a unitary state

Appeals may be taken from the Appellate Division of the Supreme Court to the Privy Council, with the special leave of the Privy Council

## §4 DOMINION STATUS

Canada, Australia, and South Africa<sup>4</sup> are 'Dominions' The term 'dominion status' is used to indicate the position and mutual relation of the United Kingdom and the Dominions.

<sup>1</sup> Africans in other provinces, barring a few in Natal, have no right to vote

<sup>2</sup> Keith, *op cit*, p 289

<sup>3</sup> There are also some Local Divisions

<sup>4</sup> New Zealand, Newfoundland and the Irish Free State (now called Eire), together with the three mentioned in the text, are the Dominions mentioned in the Statute of Westminster



The most authoritative definition of this status is that of the Inter-Imperial Relations Committee appointed by the Imperial Conference of 1926.

‘They are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations’

The Committee added

‘Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever’

The Statute of Westminster, passed by the British Parliament in 1931, gave legal recognition to the equality of status mentioned in this definition

The substance of dominion status, then, is complete autonomy in internal and external affairs. Three things must, however, be emphasized, if one is to have a proper perspective of it. First, the equality of status recognized by the Statute of Westminster was not *granted* by it. That statute ‘represents the outcome of a long process of development under which the Dominions had achieved *almost* full autonomy as regards internal affairs, and its importance lies mainly in the fact that it establishes as law what had before rested on convention’.<sup>1</sup> Second, the recognition of equality of *status* does not mean that Britain and every one of the Dominions are equal in every way in respect of their functions or of their importance in the Commonwealth. The Committee which recognized the equality of status itself added that ‘the principles of equality and similarity, appropriate to *status*, do not universally extend to *function*’. This addition is but a recognition of the fact that some members of the Commonwealth (particularly New Zealand, Newfoundland, and Australia), while completely autonomous in name, do not yet feel free to use their autonomy irrespective of the wishes of other Dominions and Britain in matters of diplomacy and defence; they still need Britain’s guidance and help. It is significant that the clauses of the Statute of Westminster, which gave legislative autonomy to the Dominions,<sup>2</sup> have not yet been formally adopted by the Parliaments of New Zealand and New-

<sup>1</sup> Keith, *The Dominions as Sovereign States*, p. 61, italics ours

<sup>2</sup> See below, pp. 347 and 348

foundland And third, we must take note also of certain conventions, in addition to the law as embodied in the Statute of Westminster, if we are properly to grasp the full implications of dominion status

We may discuss these implications under three heads (i) internal affairs, (ii) external and intra-imperial relations, and (iii) secession

### *Internal affairs*

The Dominions are free to pass any laws they like Their laws may not be declared *ultra vires* on account of repugnancy to laws passed by the British Parliament Further, that Parliament may not pass laws applicable to them except with their consent This legislative freedom is expressly recognized by the following clauses of the Statute of Westminster.

2 (1) 'The Colonial Laws Validity Act, 1865'<sup>1</sup> shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion

2 (2). No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion

3 It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as a part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof

The Dominions are also free to administer their own laws and have them interpreted by their courts without interference from, or subjection to, Britain

<sup>1</sup> This Act provided that any colonial legislation which was repugnant to an Imperial Act applicable to the Colony was to that extent void and inoperative.

There are some laws and conventions which appear to impose limitations on their internal sovereignty ; but they are not real limitations, for the Dominions are at perfect liberty to abolish them if they so choose

(i) The Governor-General of every Dominion is appointed and removed by the king of England ; this is no restriction on Dominion sovereignty, because the king appoints him on the advice of the Dominion Government. Eire has no Governor-General. (ii) The Governor-General may reserve a Dominion bill for the consideration of His Majesty,<sup>1</sup> but both the reservation, and the decision as to its fate if reserved, must be exercised in accordance with the advice of the Dominion Government. Moreover, the Dominion is at liberty to abolish the reservation. (iii) The king may disallow Dominion bills. Not only has disallowance been long a dead letter, but, when the king disallows a Dominion bill, he must disallow it, with one exception,<sup>2</sup> on the advice of the Dominion Government. (iv) New Zealand and Newfoundland have not chosen to avail themselves of the legislative freedom granted by the Statute of Westminster by adopting the relevant clauses, 2, 3, and 4, these can come into operation there only if adopted by their Parliaments. (v) Canada has no power to amend her constitution, but this is because of the inability of the federation and the provinces to agree on a method of amending the constitution without the intervention of the British Parliament. (vi) Appeals may be taken from the Dominions to the Judicial Committee of the Privy Council in London. This is hardly a restriction as it is open to the Dominion Parliaments to abolish such a provision, indeed, Canada has already abolished this in respect of criminal cases. (vii) The king has the prerogatives of mercy and of honour, it is open to the Dominion Parliaments to regulate or cancel them. (viii) Since 1934, the status of Newfoundland has been

<sup>1</sup> In Australia, New Zealand, and South Africa the Governor-General has to reserve certain bills. For example, under section 74 of the Australian constitution, a law limiting the matters on which appeals may be permitted to the Judicial Committee must be reserved.

<sup>2</sup> The exception is that any legislation in Canada, Australia, and New Zealand that appears to the Government of the United Kingdom to alter the provisions affecting the stock (of money borrowed in London) to the injury of the stock-holders in the case of trustee securities might be disallowed. The case of South Africa is substantially the same. This is intended to facilitate Dominion borrowing in the London market, and is not a serious derogation of sovereignty. See *The British Empire*, pp 290-1

in abeyance, but this has been due to the voluntary action of Newfoundland herself. She wanted to get Britain's help to reform her administration and 'place her finances on a sound footing, and asked that her old constitution should be suspended, she is at liberty to resume dominion status whenever she wants to do so (ix). From a strictly legal point of view, it may be argued that the imperial Parliament which removed the restrictions on Dominion legislation by the Statute of Westminster (being a sovereign body) is free to reimpose them, the argument is purely academic.

### *External and intra-imperial relations*

The principle of equality of status applies to the sphere of external affairs as well. It means that

'each Commonwealth Government is the final judge of what its policy in any matter should be, and of the extent to which it should co-operate with the other Governments in the conduct of external affairs. This follows naturally from the fact that each Government is responsible to its Parliament for the policies that it pursues and for the manner in which it applies them' <sup>1</sup>

The Dominions are members of the League of Nations and are eligible for membership of its Council.

Every Dominion has the right of being represented in foreign States through its own ministers, Canada recently <sup>2</sup> signed an agreement with the U S S R providing for an exchange of consular representatives between the two countries. It can make such treaties as it likes with foreign States and have them signed by its own representatives. For instance, Canada insisted on this right in 1923 in the matter of the Halibut Fishery Treaty with the U S A. It has the right to renounce obligations in respect of treaties to which it has not been a party: none of the Dominions, for instance, accepted the obligation imposed by the Locarno Pact of 1925 which had been negotiated and signed by Britain without their consent.

Certain conventions, however, have been evolved to preserve the greatest possible measure of unity, and to obtain the maximum co-operation, in foreign policy. It is generally agreed <sup>3</sup>

(1) That no treaty should be negotiated by any of the Governments of the Empire without due consideration of its possible

<sup>1</sup> *The British Empire*, p. 217

<sup>2</sup> 5 February 1942

<sup>3</sup> Resolutions of the Imperial Conferences of 1923, 1926 and 1930

effect on other parts of the Empire, or on the Empire as a whole.

(ii) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that the other Governments of the Empire are informed, so that they may have an opportunity of expressing their views if they feel their interests are affected, and of participating in the negotiations if they consider such participation necessary. (iii) In all cases where more than one of the Governments of the Empire participate in the negotiations, there should be the fullest possible exchange of views between those Governments before and during the negotiations. (iv) Steps should be taken to ensure that those Governments of the Empire whose representatives are not participating in the negotiations, should, during their progress, be kept informed on any points arising in which they may be interested.

The most difficult question in respect of foreign policy is that of war and neutrality. Can a Dominion remain neutral in a war to which Britain is a party? The question arises because

'it is legally impossible for Great Britain to be at war without the whole of the Empire, including the Dominions, being at war too, and it is *legally* impossible for any Dominion to be at war without Great Britain being at war. It is only the king who can legally make a declaration of war and the king cannot be partly at war and partly at peace'.<sup>1</sup>

It is, however, settled doctrine that no Dominion need take steps to aid the Empire in any war which has not been brought about by its own action; that the king in committing a Dominion to a war must take its consent,<sup>2</sup> and that provision must be made for associating the Dominions in the body which takes final decisions in the conduct of the war, so that they may be heard in the formulation and direction of policy.

The relations of the members of the Commonwealth *inter se* are not generally considered relations governed by international law,<sup>3</sup> and disputes between them may not be submitted to the Permanent Court of International Justice.

<sup>1</sup> Salant, *op cit*, p. 31.

<sup>2</sup> It is significant that when the war broke out in 1939, the South African Parliament discussed the question of remaining neutral, though the resolution in favour of neutrality was defeated. Eire has remained neutral, and, what is more, her neutrality has been recognized both by Britain and Germany. These points suggest the thought that neutrality is legally possible.

<sup>3</sup> In 1924, however, acting on the contrary assumption, the Irish Free State had its Treaty of 1921 with Britain registered with the Secretariat of the League of Nations as required under Article 18 of the League Covenant.

*Secession*

If dominion status must be equal to complete independence, it may be argued that the Dominions must have the right to decide whether they will be within or outside the Empire. Have they the right of secession?

It is now generally agreed that, from the political point of view, a Dominion which wants to leave the Empire is at liberty to do so. Thus Britain is not likely to coerce a Dominion to remain within the Empire as she attempted to coerce the thirteen colonies of America in 1776. But the legal position is not free from doubt. Here it is sufficient to cite the opinion of Keith, that 'the union of the parts of the Commonwealth is one which cannot be dissolved by unilateral action'

'The Dominions were created as organized Governments under the British Crown, and there is no provision in their constitutions which contemplates that they have the right to eliminate the Crown or to sever their connexion with it'<sup>1</sup>

Further, the preamble to the Statute of Westminster says

'It is meet and proper that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom'

The secession of any part of the Commonwealth clearly involves a change in the position of the Crown, and, therefore, it would seem to follow that to effect separation, it would in law be necessary for a law to be passed by the British Parliament, as well as by the Parliament of the Dominion concerned *and* by the Parliaments of the other Dominions<sup>2</sup>

<sup>1</sup> Keith, *The Constitutional Law of the British Dominions*, p. 60

<sup>2</sup> It ought to be added even in this brief study that the position of Éire as a Dominion is quite a peculiar one, as she has eliminated the Crown in her internal affairs. The only link between Éire and the Crown is provided by the Executive Authority (External Relations) Act, 1936. This says that so long as the Irish Free State is associated with Australia, Canada, Great Britain, New Zealand, and South Africa, and so long as the king recognized by those nations as the symbol of their co-operation continues to act on behalf of each of these nations 'for the purposes of the appointment of diplomatic and consular representatives and the conclusion of international agreements,

It may be urged, however, as against this view, that preamble is not law, that historically the object of the preamble was to bind the British Parliament, not the Dominion Parliaments; and, above all, that section 2 of the Statute of Westminster is so clear and unambiguous about the legislative freedom given to the Dominion Parliaments that they could legally pass a law declaring secession

At present the issue of secession is not in the forefront.<sup>1</sup> The bonds that link the Dominions to Britain are partly legal and constitutional, and partly sentimental. The legal and constitutional links are allegiance to the Crown, a common status throughout the world as British subjects and the possibility of legislation (applicable to one or more of the Dominions) by the imperial Parliament with the consent of the Dominion or Dominions concerned. The sentimental ties are a common flag, providing a focus of patriotism and an object of pride, the desire to preserve the Empire as a common heritage; common political ideals of democracy and freedom, and the hope that, because of these sentimental attachments, some measure of common action may be possible, when necessary, in defence and economic development

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the king recognized may, and is hereby authorized to, act on behalf of the Irish Free State for the like purposes as and when advised by the Executive Council so to do'

<sup>1</sup> It has considerable support in Eire and South Africa

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## CHAPTER XX

# SWITZERLAND

### §1 INTRODUCTORY

Switzerland is a small federal State of 22 cantons<sup>1</sup> with about four million people. Her political institutions deserve study because they have 'demonstrated the possibility of close co-operation between people who at one time were independent of each other politically and who today are widely divided by language and religion'. About 71 per cent speak German, 21 per cent French, and about 6 per cent Italian. By religion about 57 per cent are Protestant, nearly 41 per cent Catholic, and 0.5 per cent Jews. The Swiss system of government is a 'real democracy in operation', to use Bonjour's significant phrase; Switzerland has a greater variety of institutions based on democratic principles than any other country.

The modern history of Switzerland begins with its recognition as an independent and sovereign State by the Treaty of Westphalia (1648). At that time, and for two centuries later, it was a confederation, a league of States, with no strong central authority. A civil war which broke out in 1848 between the Catholic and Protestant cantons induced the Swiss people to transform their confederation into a strong federation, though they still call their State 'the Swiss Confederation'. The constitution of 1848 was revised in 1874, and the constitution of that year, modified later in some respects, is the one under which Switzerland is governed today.

The constitution is a rigid one but there are two methods of amending it.<sup>2</sup>

(i) If both Houses of the Legislature agree on a particular amendment, it must be submitted to the voters, and becomes

<sup>1</sup> Or more correctly 19 cantons and 6 half-cantons. 'Each of the half-cantons has a government of its own as complete as that of any of the whole cantons. It counts for only half as much as a whole canton, however, in a constitutional referendum, and sends but one representative to the upper House of the federal Legislature, whereas each of the whole cantons sends two' (R. C. Brooks, *Government and Politics of Switzerland*, p. 53).

<sup>2</sup> Chapter III of the constitution (Articles 118-23).

law if approved not only by a majority of the citizens voting but also by a majority of the cantons, i.e. by a majority of voters in a majority of cantons. This method is known as the obligatory referendum.

(ii) If 50,000 citizens desire a certain amendment, they may send up the proposal in general terms, or in the form of a bill complete in all details, by means of an initiative petition

When an initiative demand is couched in general terms (unformulated initiative), the Federal Assembly, if it approves of it, will proceed to undertake the revision in the sense indicated in the demand, and will submit it for adoption or rejection by the people and the cantons. If, on the contrary, it does not approve, the question whether there shall be a revision or not must be submitted to the vote of the people. If a majority of the Swiss citizens taking part in the vote pronounce in the affirmative, the Federal Assembly will proceed to undertake the revision in conformity with the decision of the people.

When a demand is presented in the form of a bill complete in all details (the formulated initiative), the Federal Authority must submit it for the approval of the people and the cantons. If the Federal Assembly does not approve of it, however, it may frame a bill of its own or recommend to the people the rejection of the bill proposed, and submit to them its own bill, or proposal for rejection, at the same time as the bill presented by popular initiative.

To become law the bill must be accepted by a majority of voters and a majority of cantons.

## §2 DIVISION OF POWERS

The division of powers in Switzerland between the Centre and the units resembles that in the U S A in its essential feature: the powers not vested in the Centre and not prohibited to the units belong to the units. 'The cantons are sovereign so far as their sovereignty is not limited by the Federal Constitution; and, as such, they exercise all the rights which are not delegated to the Federal Power.'<sup>1</sup>

The federal powers are partly exclusive and partly concurrent. Among the former are the right to declare war and conclude peace, and to make alliances and treaties with foreign States

<sup>1</sup> Article 3 of the constitution.

(subject to the proviso that the cantons retain the right to conclude treaties with foreign States in respect of matters of public economy and police and border relations); military instruction and the arming of troops; the policing of embankments and forests; the utilization of water-power: aerial navigation; customs duties; posts and telegraphs; roads and bridges in the maintenance of which the 'Confederation' is concerned; railways; coinage; issuing bank-notes and other fiduciary money; weights and measures, and the manufacture and sale of gunpowder. Among the powers which the Federal Authority may exercise in common with the cantons are civil and criminal law; the regulation of fishing and hunting; the regulation of industry and insurance; the control of the press, and the encouragement of education 'When the Federal Government exercises a concurrent power, its statutes prevail over those of a canton.'

There are some prohibitions on the Federal Authority as well as on the cantons, e.g. no person may be compelled to become a member of any religious association, submit to any religious instruction, perform any act of religion, or incur any penalties of any kind whatsoever by reason of his religious opinions; no impediment to marriage may be based upon grounds of religious belief, the poverty of either party, their conduct, or any other considerations of a police nature; the sentence of death may not be pronounced for any political offence. Examples of prohibitions imposed on the cantons alone are that no canton may expel from its territory any citizen of the canton nor deprive him of his rights as a native or burgher, subject to any stamp duty or registration duty documents which are liable to Federal stamp duty or which have been exempted therefrom, attack other cantons in the event of differences arising between it and them

While the division of powers in Switzerland is thus similar to that in the U. S. A. in its essential features, it differs in three respects *First*, the sphere of the Federal Authority and that of the cantons are not, as they are in the United States, separated into water-tight compartments, especially in the field of administration. There are certain departments of the administration which have been entirely centralized and in which the Federal Authority enjoys the sole control of officials, the collec-

### §3] EXECUTIVE, LEGISLATURE AND JUDICIARY

tion of customs duties, the management of the telegraphs, the telephone service, and the post offices are examples. In others—such as civil law—the Federal Authority legislates, but the cantons organize the courts, determine legal procedure and appoint judges. For the execution of many federal laws, the Federal Authority makes use of the administrative machinery of the cantons, which is to this extent placed in a subordinate position in relation to that Authority. Such is the case, for instance, in the execution of military laws. *Second*, the Federal Government in Switzerland is vested with greater powers than that in the U. S. A. Not only has it a larger number of legislative powers than the latter, it has wider powers in respect of the guarantee of cantonal constitutions, the preservation of the rights of the people, and the like. Thus the constitution provides that the 'Confederation' guarantees to the cantons their territory, their sovereignty within specified limits, their constitutions, the liberties and rights of their people, the constitutional rights of the citizens, and the rights and powers conferred by the people on the authorities. As a condition of the guarantee, the Federal Authority may demand that the cantonal constitutions contain no provisions contrary to those of the Federal Constitution, that they assure the exercise of political rights according to republican—representative or democratic—forms of government, and that they have been accepted by, and are susceptible to amendment at the demand of, the absolute majority of the people. Further, in case of differences arising between cantons, the cantons must submit to the decision of the Federal Authority, in case of disturbances within the canton, the Government of the canton has to notify the Federal Executive, which is authorized to take the necessary steps to restore order. And *third*, the cantons in Switzerland do not enjoy the same security against invasion of their powers by the Federal Legislature as the states in the U. S. A. because the Swiss Federal Court has no power, unlike its counterpart in the U. S. A., to declare any federal law unconstitutional.

### §3 THE EXECUTIVE, THE LEGISLATURE AND THE JUDICIARY

#### *The Executive*

The supreme executive power of the Federation is vested in a Federal Council composed of seven members elected for four

years by the two chambers of the Federal Assembly (the Federal Legislature) in joint session. The constitution does not require that the members should be chosen from the Assembly, any Swiss citizen eligible for the National Council being eligible also for the Federal Council; in practice, the Assembly chooses the Federal councillors from its own ranks. According to constitutional law, no two members of the Federal Council can be chosen from the same canton; and, according to convention, not more than five are chosen from the German-speaking cantons

The Federal Assembly annually elects the President and the Vice-President of the Federal Council. It is provided in the constitution that the President shall not be elected President or Vice-President for the ensuing year; and by custom the Vice-President one year is always elected President in the subsequent year, so that the office passes by rotation among the members of the Council. During his year of office, the President of the Council is President of the Swiss Confederation. He has, however, no more power than the other councillors, and is no more responsible than they are for the course of the Government. 'He is simply the chairman of the executive committee of the nation, and as such he tries to keep himself informed of what his colleagues are doing, and performs the ceremonial duties of the titular head of the State'<sup>1</sup>

The powers of the Federal Council may be described under three heads: executive, legislative and judicial. As head of the administration it ensures the observance of federal laws and the maintenance of peace and order; has general charge of foreign affairs and 'ensures the external safety of Switzerland and the maintenance of its independence and neutrality'; administers the finances of the Federation, prepares the budget and submits accounts of receipts and expenditure; makes such appointments as are not entrusted to the Federal Assembly, Federal Tribunal, or other authority; supervises the conduct of business by all Federal employees, and enforces the guarantee of the cantonal constitutions.

Its members have the right to speak, but not to vote, in both Houses of the Federal Assembly, and also the right to table motions on the subject under consideration. They are subject to interpellation in either House. The Federal Council has the

<sup>1</sup> A. L. Lowell, *Greater European Governments*, p. 319

### §3] EXECUTIVE, LEGISLATURE AND JUDICIARY

right of introducing bills into the Federal Assembly. 'As a matter of fact most of the important measures of federal legislation, including the budget, are drawn up by the Federal Council, either upon its own motion or upon request by the Houses'

Its judicial duties relate to some cases arising out of administrative law. Originally it served as the chief administrative court of the State, but, latterly, much of its administrative jurisdiction has been transferred to the Federal Court.

The Swiss Executive is remarkable for three features *First*, it is a collegiate, a plural, executive. It has no prime-minister. The President does not select his colleagues, and has no authority over them. *Second*, it is at once a parliamentary and a non-parliamentary Executive. It is parliamentary in so far as (i) its members are chosen by, and in practice from, the Legislature; (ii) its members have the right of being present in the Legislature, taking part in its discussions and introducing bills, (iii) it carries out the will of the Legislature. It is worthy of note that the responsibility of the Executive to the Legislature is enforced in different ways in Switzerland and in Britain. In Britain, the cabinet resigns if a bill introduced by it is defeated in Parliament, or if a bill introduced by a private member is passed by Parliament against its opposition. In Switzerland, members of the Federal Council are not expected to resign because a bill introduced by them, however important it may be, has failed of passage in the Federal Assembly<sup>1</sup>. They simply drop the matter, or remodel the bill to meet the criticism which has caused its defeat. It is a non-parliamentary Executive because (i) its members are not members of the Legislature; indeed, when chosen Federal Councillors they resign their seats in the Federal Assembly and (ii) their term of office is fixed, the Federal Assembly has no power to dismiss them out of hand. The Swiss Executive, therefore, combines the merits of both types of Executive, viz responsibility and stability. *Third*, it is not based upon a party majority in the legislative bodies,<sup>2</sup> its members 'are elected not only from different party groups but from party groups fundamentally opposed to each other'. Its non-partisan character makes it possible for the Council to be virtually a permanent body. While it is elected afresh every four years the old members are often re-elected if they are willing to serve. Some members

<sup>1</sup> Brooks, op cit, p 127

<sup>2</sup> ibid, p 127

of the Council have held office as long as thirty-two years<sup>1</sup> If it be asked, how they are able to work together without much friction, the explanation lies in the political sense of the Swiss, in their ability to understand and practise compromise in Politics

The Swiss Executive has indeed earned the admiration of many competent observers The opinion of Bryce<sup>2</sup> is typical

‘It provides’, says he, ‘a body which is able not only to influence and advise the ruling Assembly without lessening its responsibility to the citizens, but which, because it is non-partisan, can mediate, should need arise, between contending parties, adjusting difficulties and arranging compromises in a spirit of conciliation It enables proved administrative talent to be kept in the service of the nation, irrespective of the personal opinions of the Councillors upon the particular issues which may for the moment divide parties . . . It secures continuity in policy and permits traditions to be formed’

### *The Legislature*

The Federal Assembly is a bicameral body, composed of the Council of States (the upper Chamber) and the National Council (the lower Chamber).

The Council of States is composed of 44 members, two from each full canton and one from each half-canton. The method of choice and the term of office of the members are decided by the cantons As a matter of fact in all but four cantons, the members are elected by the people, in the exceptional four cantons they are elected by the cantonal Legislatures Their terms of office are four years in fourteen cantons, three in eight, and one in three<sup>3</sup>

The National Council consists of 194 members, elected for four years by proportional representation<sup>4</sup> Every male citizen who has reached the age of twenty years, and who is not excluded from the rights of active citizenship by the laws of the canton in which he is domiciled, has the right to take part in elections Each canton elects a member for every twenty thousand inhabitants, but no canton, however small its population, is without at least one representative Every Swiss citizen entitled to vote is eligible for membership of the National Council.

<sup>1</sup> *ibid*, p 106

<sup>2</sup> *Modern Democracies*, Vol I, pp 398-9

<sup>3</sup> W E Rappard, *The Government of Switzerland*, p 59

<sup>4</sup> There are some cantons which return only one member each, in these there is, of course, no proportional representation

### §3] EXECUTIVE, LEGISLATURE AND JUDICIARY

The two Chambers have absolutely equal powers, at any rate in theory. No measure can be enacted which has not been approved by both. This is a unique feature. Authorities, however, tell us that, in practice, the Council of States has become definitely inferior in importance, it is more inclined to concessions than the National Council.

The constitution states explicitly that subject to the rights reserved to the people and to the cantons, the supreme power of the Confederation shall be exercised by the Federal Assembly. This is a significant fact, it means that the Legislature is supreme so long as it retains the confidence of the people. Its decisions are not subject to any executive or judicial veto. It passes laws on federal matters and revises the constitution (subject to the powers reserved to the people). Its consent is necessary for treaties with foreign States, for the declaration of war and the conclusion of peace. The enactment of the annual budget, the approval of State accounts and decrees authorizing loans are included among its powers. It is vested with a general supervision of federal administration and of the Federal Court. It decides conflicts of jurisdiction between the federal authorities. Finally, it elects the Federal Council, the Federal Tribunal, the Chancellor, and the Commander-in-Chief of the federal army. In respect of other offices also, the Legislature may be vested by federal legislation with the right of election or confirmation.

The two chambers meet separately for all purposes except for electing the officers mentioned, exercising the right of pardon, and pronouncing on conflicts of jurisdiction, when they meet in joint session.

#### *The Judiciary*

The constitution provides for the establishment of a Federal Tribunal, the *Bundesgericht*, for the administration of justice in federal matters. Judges are elected by the Federal Assembly. Any Swiss citizen eligible for election to the National Council may be elected a member of the tribunal, provided he is not a member of the Legislature or holder of any other office simultaneously. The number of judges and the organization of the court are determined by law. At present there are 24 judges. Their term of office is six years, by custom the members of the tribunal are re-elected as long as they care to serve.



The jurisdiction of the tribunal covers all civil suits between the Confederation and the cantons or between the cantons themselves. It also covers all suits brought by an individual or corporation against the Confederation, and suits between a canton and an individual or corporation, if either party demands it and if the matter in dispute reaches the degree of importance to be prescribed by federal legislation. The Federal Assembly also has power to enlarge the jurisdiction of the tribunal ; this power has been used so freely by the Assembly that the Tribunal has now a large appellate jurisdiction in civil suits brought up from cantonal courts. Finally, it now functions also as an administrative court.

The Swiss Federal Tribunal is, however, less powerful than the Supreme Court of the U. S. A. because it has no power to declare *federal* laws unconstitutional. The constitution expressly<sup>1</sup> that the Federal Tribunal shall administer the laws passed by the Federal Assembly and such decrees of that Assembly as are of general application. Clearly, this means that the cantons have no safeguard against encroachment on their powers by the Federal Government. The danger is lessened by the fact that the methods of popular legislation prevalent in Switzerland provide ample facilities for a majority of the cantons to prevent a federal law from coming into effect.

#### §4 THE REFERENDUM AND THE INITIATIVE

Of the many democratic institutions in Switzerland, the one that most deserves study is the popular voting upon laws by means of the referendum and the initiative. The referendum consists of the submission to the people, for approval or rejection, of a law passed by the Legislature. The initiative is the right of private citizens to bring forward a proposal of a constitutional or legislative character for the decision of the whole people.

The referendum is of two kinds, compulsory and optional. It is compulsory when every law passed by the Legislature must be submitted for the approval of the people, optional when a bill passed by the Legislature need be referred to the people only on demand by a prescribed number of people. In the Federation, the referendum, we have seen, is compulsory in respect of constitutional laws. It is optional in respect of ordinary laws :

<sup>1</sup> Article 113

#### §4] THE REFERENDUM AND THE INITIATIVE

'federal laws are submitted for acceptance or rejection by the people if a demand be made by 30,000 . . . citizens or by eight cantons. Federal decrees which are of *general effect* and are *not urgent* are likewise submitted on demand' <sup>1</sup> The interpretation of what is of a general nature and what is urgent is left to the Legislature. In the cantons, the compulsory form of referendum has been gradually prevailing over the optional. It is in use in all the cantons for amendments to the constitution and in several for the adoption of ordinary laws as well. The referendum (whether compulsory or optional) is used in all cantons, except one, for the adoption of ordinary laws.

The initiative, as has been noted earlier, is in use in the Federation for constitutional laws in two forms, the formulated and the unformulated; it is not used in the Federation in respect of ordinary laws. It is in use in all cantons, except one, for constitutional laws, and in all except three for ordinary legislation.

The machinery of the referendum and the initiative in Switzerland is roughly as follows. In the case of the compulsory referendum, the procedure is simple. Once or twice a year, sometimes more, the people are called upon to vote by secret ballot in their communes upon the proposals adopted in the interval by the Federal Assembly or the cantonal Legislature. With the optional referendum some preliminary formalities are necessary. Within a period of from one to twelve months (90 days in respect of Federal laws) citizens who desire the rejection of a law must collect the number of signatures required by law (in some cantons as few as 500, in the Federation as many as 30,000). The date for the popular voting is then fixed, normally allowing a sufficient interval to permit the supporters and opponents of the proposal under reference to place their arguments before the people. If the vote is against it, the matter is referred by the Executive to the Legislature. This body, after examining the correctness of the returns, passes a resolution declaring its act to be void. The procedure for the initiative petition is much the same as for the optional referendum, except that here the signatures are obtained for a new law, not for cancelling a law passed by the Legislature. Invariably, too, opportunity is afforded to the Legislature to express its opinion on the proposed law, and to suggest counter-proposals, if it so desires.

<sup>1</sup> Article 89, italics ours

If we take into account the referendum and the initiative relating to federal matters only, from 1848-1935 the Swiss people were called to the polls one hundred and twenty-three times to express their opinion on some piece of constitutional or ordinary legislation ; that is, an average of about 1.4 times a year<sup>1</sup> In cantonal matters, these methods have been used oftener. The experience of their working shows that, in general, (i) the effective influence of the initiative is less than that of the referendum ; (ii) where the referendum is optional, it is little resorted to ; (iii) the proportion of the people who vote at a referendum is less than that for ordinary elections, suggesting that people are more willing and qualified to choose between men than between laws ; and (iv) the people show a tendency to reject radical measures , a good example is the rejection in 1922 of an initiative proposal to impose a special tax on property in excess of 80,000 francs<sup>2</sup>

Finally, from all accounts, it is clear that the referendum and the initiative have come to stay in Switzerland, the Swiss being on the whole satisfied with their experiments in direct democracy Defects indeed there are occasionally, influenced by local rivalries, the people use the referendum and the initiative as instruments of a narrow conservatism or demagoguery But, nevertheless, on the whole they are valued, particularly as useful agencies of civic education and as the surest methods of discovering the real wishes of the people , they are excellent barometers of the political atmosphere Foreign students of the Swiss constitution also agree that the methods of popular legislation have worked successfully in Switzerland, the Swiss people being well qualified by intelligence and knowledge of public affairs, their non-partisan and independent spirit and their conservative nature, to profit by them<sup>3</sup> It is indeed the excellence of individual character that has made Switzerland the envy and pattern of modern democracies

‘ Survey the countries of the world ’, writes Dubs ,<sup>4</sup> ‘ you may find elsewhere greater political achievements, but assuredly in no country will you meet so many good citizens of independent opinions and sound practical judgement ; nowhere so great a

<sup>1</sup> Rappard, op cit , p 71

<sup>2</sup> *American Political Science Review*, 1923, p 445

<sup>3</sup> Bryce, op cit , Vol I, pp 448-53

<sup>4</sup> In his *Manuel de droit public*, cited by Bonjour in *Real Democracy in Operation*, p 17

#### §4] THE REFERENDUM AND THE INITIATIVE

number of public men who succeed in fulfilling their functions in minor spheres with dignity and skill, nowhere so large a proportion of persons who, outside their daily round, interest themselves so keenly in the welfare and in the difficulties of their fellow citizens'

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## CHAPTER XXI

# TOTALITARIAN STATES

### §1 GERMANY THE WEIMAR CONSTITUTION

The government of Germany today is formally based<sup>1</sup> on what is known as the Weimar constitution, i.e. the constitution framed at Weimar in 1919. Fundamental changes have been made in that constitution since the rise of the Nazis to power, so fundamental indeed that its makers would hardly recognize their handiwork in its present modified form. Nevertheless, for a proper understanding of the present situation, it is necessary to describe the essential features of the Weimar constitution.

Under the Weimar constitution, Germany was a federal State composed of eighteen states (or, more properly, territories, *Länder*).

The constitution could be amended by legislation, but only if an amendment was passed by a two-thirds majority of the members of the Reichstag<sup>2</sup> present (provided too that at least two-thirds of the legal total of members were present) and by a two-thirds majority of the votes cast in the Reichsrat<sup>3</sup>. If the necessary majority in the Reichsrat was not reached, and within two weeks the Reichsrat demanded an appeal to the people, the amendment had to be submitted to the people and the consent of a majority of the voters was necessary. The constitution could also be amended on the initiative of one-tenth of the qualified voters, supported, on a referendum, by a majority of the voters.

The constitution enumerated the powers of the Federal Government and left the residue with the states. The powers given to the Federal Government, however, were so many that the states became relatively unimportant in the federal system. The Federal Government had exclusive legislative powers on such subjects as foreign relations, colonial affairs, nationality, freedom of domicile, immigration and emigration, military organization,

<sup>1</sup> F. Ermarth, *The New Germany*, p. 46. 'The Weimar constitution has never been formally abrogated. The German courts continue to apply it and refer expressly to those provisions that are still in force.'

<sup>2</sup> The lower House of Parliament.    <sup>3</sup> The upper House of Parliament.

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the monetary system, customs, and posts and telegraphs. It had concurrent powers regarding civic rights, penal law, judicial procedure, passports, poor relief, the press, associations and assemblies, population questions, public health, labour laws, commerce, weights and measures, paper money, banking and exchange, traffic in foodstuffs, luxuries and articles of daily necessity, industry and mining, insurance, navigation and railways. If there was a conflict between federal law and state law on a concurrent subject, the former prevailed. In cases of doubt the Supreme Court decided the matter. Where there was need for the issue of uniform regulations, say in respect of sanitary administration or the maintenance of public order and security, the Federal Government could pass laws on these matters. It could by legislation lay down fundamental principles governing the rights and duties of religious associations, education, the conditions of service of officials and the land laws. Finally, its taxation power was practically unlimited, it was only required to have some consideration for the financial requirements of the states. Add to this the fact that the federal laws were for the most part carried out by the state authorities, subject to the Federal Government's instructions and supervision, and the enormous power of that Government is obvious. No wonder that many competent observers considered Weimar Germany (though technically federal) to be in effect a unitary State <sup>1</sup>

### *The Executive .*

The chief executive authority was vested in the President, elected by popular vote (the vote being given to men and women of twenty and over) for seven years. Any German who had completed his thirty-fifth year was eligible, and the details of the election were determined by law. The President was eligible for re-election. He could be removed from office before his term was over by impeachment before the supreme judicial court, or by a resolution of the Reichstag supported by a two-thirds majority and ratified by a popular referendum. If, however, the people did not ratify the resolution by a majority, their refusal operated to re-elect the President for a full seven-year term and the Reichstag which proposed the recall was dissolved. On paper the

<sup>1</sup> See A. L. Lowell, *Greater European Governments*, p. 285, and the authorities cited therein.

powers of the President were considerable: he had command over the army and the navy, he represented the State in foreign affairs and concluded treaties with the consent of the Reichstag; he appointed and dismissed officials, where no other system of doing so was prescribed by law, he could make use of the armed forces to compel a state to fulfil the duties imposed on it by the constitution or the laws of the Reich; he could take steps to restore public security and order in case they were seriously disturbed and for this purpose abrogate the fundamental rights of the people (such as personal liberty, secrecy of correspondence, freedom of speech, publication and association, and property); and, finally, he had power to grant pardon. But, as in France, all orders and decrees of the President required for their validity the counter-signature of the Chancellor, or a minister, who was really responsible to Parliament. In other words, the principle of ministerial responsibility made the President the nominal head of the State, and in this respect he was like the French President and the English king.

The Government of the Reich consisted of the Chancellor and ministers. The President appointed and dismissed the Chancellor; and on the latter's recommendation, the ministers. It was expressly provided by the constitution that the Chancellor and the ministers required the confidence of the Reichstag in the administration of their office. Any one of them had to resign 'should the confidence of the Reichstag be withdrawn by an express resolution'. Although the Chancellor laid down the general course of policy, each minister conducted the branch of administration entrusted to him and was personally responsible for it to the Reichstag. It was thus possible for the Reichstag to vote want of confidence in a single minister, as well as in the cabinet as a whole. The German Executive was thus a parliamentary one, on the model of the English and the French.

### *The Legislature*

The Parliament was bicameral, consisting of the Reichsrat, or upper House, and the Reichstag or lower House.

The Reichsrat had 66 members, each state sending one or more members of its ministry,<sup>1</sup> in the ratio of one member for every million inhabitants, with the qualification that every state

<sup>1</sup> Half of the representatives of Prussia had to be appointed from among the Prussian provincial administrative authorities.

## §1] GERMANY: THE WEIMAR CONSTITUTION

had at least one representative and no state, however large, had more than two-fifths of the total number. This latter provision was obviously intended to prevent Prussia, with about three-fifths of the population of Germany, from dominating the chamber. The Reichsrat was intended to function rather as a preliminary chamber than a revisory one bills introduced by the Government were first placed before the Reichsrat If the Reichsrat disagreed with the Government, the Government could still introduce them in the Reichstag, but in doing so had to state the divergent opinion of the Reichsrat Similarly, the ministry was bound to introduce in the Reichstag bills initiated by the Reichsrat, even though they were opposed to them, but, in doing so, they could place before the Reichstag their own point of view The Reichsrat also had a suspensive veto over the bills passed by the Reichstag suspensive, because it could only delay the passing of a bill for reconsideration by the Reichstag, and, with the President concurring, have it referred to the people, its refusal to pass a bill would not by itself prevent it from becoming law

The Reichstag was elected by universal, equal, direct and secret suffrage, by all men and women over twenty years of age, in accordance with the principle of proportional representation. The total number of members was not fixed, but varied with the number of votes cast at the election, one representative being assigned to every 60,000 votes cast The actual number of members has varied from 466 to 647 The term was four years, although the body could be dissolved earlier—not exceeding once for the same cause,—by presidential decree The Reichstag had power to pass laws (subject to the suspensive veto of the Reichsrat, and the power of the people to veto the laws), it could amend the constitution (subject, again, to the powers of the Reichsrat and the people already described), control the Executive, ventilate grievances, and discuss any matter of public importance The declaration of war and the conclusion of peace, alliances and treaties with foreign States required for their validity the consent of the Reichstag

### *The Judiciary*

The judicial system recognized two series of courts, the ordinary and the administrative



Judges were appointed for life and held office during good behaviour, they could not be removed from office or transferred or retied against their will except by virtue of a judicial decision and for the reason and in the manner prescribed by law.

There was also a special tribunal (the Staatsgerichtshof) to try impeachments against the President or the ministers, and settle questions arising under the constitution (such as inter-state disputes and conflicts between the Federal Government and states)

### *Noteworthy features of the Weimar constitution*

The Weimar constitution thus provided a full-grown democratic constitution universal suffrage with provision for minority representation, a parliamentary Executive, popular initiative and popular veto on laws, and the direct selection of the head of the State being its essential features There are two other features, which may be briefly mentioned

(i) An elaborate bill of fundamental rights for the citizen, such as personal liberty, the secrecy of correspondence, freedom of speech, press and association, and the like In practice this failed to give any security of the kind contemplated

(ii) Workers' councils and National Economic Councils <sup>1</sup>

'The wage-earners and salaried employees are entitled to be represented in local workers' councils, organized for each establishment in the locality, as well as in district workers' councils, organized for each economic area, and in a national workers' council, for the purpose of looking after their social and economic interests

'The district workers' councils and the national workers' council meet together with the representatives of the employers and with other interested classes of people in district economic councils and in a national economic council for the purpose of performing joint economic tasks and co-operating in the execution of the laws of socialization The district economic councils and the national economic council shall be so constituted that all substantial vocational groups are represented therein according to their respective economic and social importance

'Drafts of laws of fundamental importance relating to social and economic policy, before introduction into the Reichstag, shall be submitted by the ministry to the national economic council for consideration The national economic council has the right itself to propose such measures for enactment into law.

<sup>1</sup> Article 165

## §2.]      *RECENT CHANGES IN GERMANY*

If the ministry does not approve them, it, shall, nevertheless, introduce them into the Reichstag together with a statement of its own position. The national economic council may have its bills presented by one of its own members before the Reichstag'

The full complement of workers' and national economic councils contemplated by the makers of the constitution never came into existence. In 1920, however, a national economic council was established on a provisional basis, with 326 members representing various economic groups, such as agriculture, industry and commerce, and with advisory powers. The German Economic Council has inspired the creation of similar bodies in other countries in Europe and elsewhere. A suggestion to create a body on similar lines in India was made by Sir Arthur Salter in a report submitted to the Government of India in 1931, the suggestion, however, was not adopted.

## §2    *RECENT CHANGES IN GERMANY*

The primary reasons for the failure of the Weimar Republic and the rise of the dictatorship of Hitler have been explained elsewhere.<sup>1</sup> Contributory factors were the humiliation consequent on defeat in the Great War and the vindictive treaty of Versailles, the economic depression, the lack of a continuous democratic tradition in Germany, the inability of the democratic Governments to solve the problems which they had to face, and the dynamic leadership of Hitler. Suffice it here to say that Hitler rose to power as the leader of the National Socialist party, which secured the largest number of seats (secured by any single party) in the Reichstag in the elections held in July 1932, and again in November of that year—though it still had no majority. On 29 January 1933, Hitler was made Chancellor. The Reichstag was dissolved, and in the elections of March of that year his party secured 288 seats out of a total of 647. Allying itself with the Nationalist Party, it had a working majority of fifty-two per cent. The new Reichstag passed on 24 March 1933 (by the required two-thirds majority for passing constitutional laws) the Enabling Act 'to end the distress of Reich and nation'. Its important provisions were

(1) National laws can be enacted by the Reich cabinet as well as in accordance with the procedure established in the constitu-

<sup>1</sup> See above, ch. XV, §7

tion This applies also to the laws referred to in Article 85, paragraph 2 (the power to enact a budget) and in Article 87 (the power to borrow) of the constitution

(ii) The laws enacted by the Reich cabinet may deviate from the constitution in so far as they do not affect the position of the Reichsrat and the Reichstag The powers of the President remain untouched

(iii) Treaties of the Reich with foreign States which concern matters of national legislation do not require the consent of the bodies participating in legislation The Reich cabinet is empowered to issue the necessary provisions of these treaties

This is a remarkable law, for, taken together with the fact that the members of the ministry were the choice of the Chancellor, it virtually meant the concentration of all legislative power in the hands of one man, Hitler

Under the powers vested in him by this law, Hitler has rapidly transformed the structure of the German State Today Germany is a unitary State, the independent powers vested in the states having been abolished in 1934 The Legislatures in the states have been dissolved, and the states are governed by high commissioners appointed by the Chancellor of the Reich, and subject to his orders The Reichsrat, the federal upper House, has no *raison d'être* and, consequently, has been abolished The head of the State is styled Leader and Chancellor ; this office combines in itself the former offices of President and Chancellor The nominal and the real heads of the State are thus combined in one person There is a cabinet to assist the Leader ; its members are appointed and dismissed by him The Reichstag continues to exist , its members all belong to one party, since all parties other than the National Socialist have been abolished by law. There is therefore no opposition. The Reichstag meets seldom ; when it does meet it does little else besides applauding a speech by Hitler. It has delegated the function of law-making to the ministry by a new Enabling Act (1937) ; this Act has been so framed as to give the ministry unrestricted power to pass any laws it thinks necessary for the good of the State The civil and judicial services of the State have been reorganized to ensure that they will be thoroughly loyal to the policy of the new State

## §3 NAZI GERMANY

Nazi Germany is characterized by five important features

(i) It is totalitarian The State is all-inclusive It offers an answer to all questions, a solution to all problems This feature follows from the first principle of National Socialist philosophy, that the State is an end in itself, and the individual but an instrument to enable it to realize that end The individual, therefore, can have no fundamental rights, he has only fundamental duties.

The control of the State over the individual and the group expresses itself in several ways Freedom of speech and association is abolished All means of moulding public opinion—the press, the theatre, the cinema, the radio, the school and the university—are strictly controlled by the State. All trade unions, and political parties, with the exception of the National Socialist party, have been destroyed As far as possible, every form of social organization that is capable of influencing the attitude and the opinion of the members of the State, social, political and economic, is brought under a leadership which is fully in sympathy with the attitude of the dominant party. Youth associations, cultural, sports and recreational bodies, co-operative societies, are all brought under the influence of the State In October 1933, a Reich Chamber of Culture was set up under Dr Goebbels This consisted of seven chambers, each dealing with some aspect of cultural life (literature, the press, the radio, the theatre, music, art, the cinema)<sup>1</sup> Each of these has a president and an executive board, and includes professional organizations from the whole of Germany The presidents come together from time to time and meet as the Reich Advisory Board of Culture<sup>2</sup> Essentially the purpose of this elaborate organization is, as Goebbels has said, 'the uniform moulding of the will' in the direction of National Socialism, and to put down all independent rights, criticism and opposition It has also been sought to bring the churches under control

In respect of economic life, the Minister of Economics has been empowered to carry out within his jurisdiction all measures that he considers necessary to foster the German national economy The type of control that is thus exercised may be illustrated from the regulation of agriculture In 1933, a sort of

<sup>1</sup> S H Roberts, *The House that Hitler Built*, p 241

<sup>2</sup> *ibid*

agricultural guild, known as the Reich Estate for Food Production, was set up, an autonomous public body with wide powers to put agriculture on a sound footing.

‘ Everything to do with agriculture came under its control. It could regulate production of all crops, it could alter or fix prices, it could organize distribution, it could reduce rates of mortgage, it could prevent industry making undue demands on agriculture, and, not least, it could enforce its decisions by penalties of imprisonment, fines up to £8,000 sterling, and by forbidding guilty persons to work on the land at all. It took over all associations, co-operative bodies, and trading groups in any way connected with agriculture ’<sup>1</sup>

(ii) It is a one-party State, only the National Socialist Party being legally recognized. The Party is declared by law to be ‘ the bearer of the idea of the German State and inseparably connected with the State ’. Its emblem, the swastika, is the emblem of the State, its leader, the head of the State. Numerous powers ‘ are transferred to the party organizations, such as the right of appointing municipal councillors, selecting jurors and members of the school boards, investigating public records and consulting with State authorities on practically every matter ’.<sup>2</sup> Members of the party are accorded various privileges, such as preference in employment, reductions in railway rates, and so on. ‘ In giving high school marks, the school authorities have to take into consideration the activities of the pupils in the youth organization ’<sup>3</sup>

(iii) It is a ‘ folk State ’. This is directly related to the racial theory which lies at the root of the National-Socialist conception of the State. The theory has two elements —(a) The ‘ blood ’ of a social group, a race, determines its total outlook and mode of thought. This is as complete a denial of other influences in the make-up of a nation’s life as Marx’s materialistic interpretation of history, which makes the mode of production determine everything. (b) The Nordic race, to which family the Germans belong, has to its credit the finest qualities of men and the greatest achievements of history. It follows, therefore, that if the nation is to be united, and keep up and improve its own record of achievements, it is essential to maintain the racial purity of the State. Members of other races, especially of inferior races like the Jews, should have no place in the State. The Jews have, therefore, been deprived of much of their property, and

<sup>1</sup> *ibid*, p. 193

<sup>2</sup> Ermarth, *op cit*, p. 65

<sup>3</sup> *ibid*, pp. 67-8n, 74

#### §4] ITALY THE CORPORATIVE STATE

of opportunities for earning a living in Germany. Marriages between citizens of German or kindred stock and Jews are also prohibited

(iv) It is a 'leader State'.

'The principle which made the former Prussian army an admirable instrument of the German nation', wrote Hitler,<sup>1</sup> 'will have to become the basis of our statal constitution, that is to say, full authority over his subordinates must be invested in each leader and he must be responsible to those above him'

Frankly, German politics is based on the principle that every citizen is directly or indirectly responsible to Hitler for his life and conduct. The Government is, therefore, a dictatorship. The actions of the Leader are above criticism, they must be right. The consent of the masses is helpful, but not essential, for the continuance of the Government. Democracy is a show, and so is the theory of separation of powers. The concentration of powers in one leader is necessary for the efficiency of the State, therefore his will must be law.

(v) It follows that all those who oppose the will of the Leader in any way must be compelled by force to obey the Leader, or, in the alternative, be put aside in what are known as concentration camps, or otherwise denied opportunity to oppose his will.

#### §4 ITALY THE CORPORATIVE STATE<sup>2</sup>

The history of modern Italy begins with the completion of her national unity in 1870, due to the efforts of three great men, Cavour, Garibaldi and Mazzini. The genesis of her constitution may, however, be traced earlier, to the *Statuto* granted by King Albert of Sardinia to his people in 1848, and later extended to the whole of Italy, when Sardinia expanded, so to say, over the

<sup>1</sup> *Mein Kampf* (tr J. Murphy), p. 375.

<sup>2</sup> Conditions in Italy from 24 July 1943, when Mussolini fell from power, are rather obscure. A new Cabinet, with Marshal Badoglio as Premier, was sworn in on 26 July, one of its very first decisions was to dissolve the Fascist party. A Naples message dated 13 November (*The Hindu*, 14 November 1943) said that Badoglio had organized a 'technical' government consisting of himself as Premier and a series of Under-Secretaries expert in the business of administration. 'This makeshift move has been forced by the flat refusal of any member of the anti-Fascist political parties led by Count Sforza to join a United Front Government as long as King Victor Emmanuel remained on the throne. Men who have been associated with Marshal Badoglio in the new Government will play no political part.' King Victor Emmanuel has since retired.

The constitution and the corporative structure outlined in the text refer to the position in Italy before the fall of Mussolini.

rest of Italy. The *Statuto* has indeed been considerably modified, especially since the Fascist Revolution of 1922. Instead of the liberal democratic constitution which it established, there is now an authoritarian regime in Italy, brought about, however, by a series of constitutional amendments to the *Statuto*. That document provided no special machinery for amending the constitution, it was taken for granted that it could be amended by the ordinary law-making body. It is noteworthy that Italy is one of the few States which have, at one and the same time, a 'written' and a flexible constitution.

Italy is a unitary State. The head of the State is the king, the succession to the throne is vested in the House of Savoy and regulated according to Salic Law, by which only male heirs are recognized. The king, like his English counterpart, is a constitutional ruler, being bound to act on the advice of the Prime Minister.

According to the constitution (as modified up to July 1943), the Prime Minister, designated 'Head of the Government' (Duce), is appointed by the king and is responsible to him for the policy of the Government. The Duce chooses the other ministers, who are responsible to *him*, besides, he directs and co-ordinates their activities. His consent is necessary before any business can be considered by Parliament. If either Chamber of Parliament rejects a measure, he may require it to be reconsidered after three months, without discussion, and to be voted upon by ballot. He may require that even though a bill is rejected by one chamber, it be considered and voted upon by the other. Without the consent of Parliament, he may promulgate decrees having the force of law, they must, however, be published immediately and referred to Parliament within two years.

The Head of the Government is advised by the Fascist Grand Council. In its origin, this Council was a purely party organ; it has now been given a legal status as part of the governmental machinery. It consists of (i) life members, the surviving members of the quadrumvirate who led the march on Rome in 1922, (ii) *ex officio* members, the ministers, the presidents of the Senate, of the Italian Academy, and of the various confederations,<sup>1</sup> and the higher officials of the Fascist party, and (iii) nominated members, appointed normally for three years by the

<sup>1</sup> Explained below

Head of the Government from among those who have rendered meritorious service to the nation or to the fascist revolution. The Head of the Government is the president of the Council. The Council has a threefold function. It appoints the chief officials of the party, including the Secretary-General. It prepares a list of people to succeed the Head of the Government in case any mishap befalls the present incumbent. It is an advisory body to the Crown and to the Head of the Government on matters of administration.

The Parliament consists of two chambers, the Senate and the Fascist and Corporative Chamber.

The Senate has 543<sup>1</sup> members. With the exception of the princes of the royal blood, who are members of the Senate, its members are nominated for life by the king on the advice of the Head of the Government from specified categories of citizens. These include the higher dignitaries of the Church, ministers, generals, admirals, ambassadors, the Attorney-General, members of the Royal Academy, persons who have for three years paid 3,000 lire in direct taxes and those who have in any capacity rendered meritorious services to the nation. According to the *Statuto*, the Senate has equal powers with the Lower House except in one respect: it cannot initiate money bills. In practice it has always been ineffective, much more so since the advent of the fascists to power, for the real power in modern Italy rests with the Executive and not with the Legislature.

The Fascist and Corporative Chamber is a recent creation, having met for the first time on 23 March 1939. Its composition is so closely related to the economic structure of the State based on the corporative principle that it is best explained after outlining that structure.

#### *Corporative structure*

It will be remembered that fascism as a political and economic theory does not share in the socialist belief of a class war, on the contrary, it believes that employers and workers are partners in one social function, viz production. The corporative structure is an attempt to translate this fascist belief into practice. It is based on the principle that employers and workers must be organized into associations approved by the State, and

<sup>1</sup> On 28 October 1939



that through these associations their participation in national production must be regulated and controlled. Its main institutions are .

(i) *Syndicates* For every trade or occupation in a district, a syndicate of employers and one of workers may be formed and may secure legal recognition. Only one syndicate may be recognized for each category and in each district. Legal recognition is granted if the syndicate concerned satisfies certain conditions. If it is a syndicate of employers, it must consist of members employing at least 10% of the workers in some branch of trade in the district, if it is an employees' syndicate, its members must include at least 10% of the workers in the particular trade and district. Among its objects must be not only the general furthering of the economic interests of its members, it must also take an active part in their technical instruction and in their religious, moral, and national education, and support of charitable foundations open to them. The legally recognized syndicate is subject to State control in several ways, e.g. the election of its president and its secretary must receive the approval of the State before they can take up their duties. It is empowered to represent legally the particular division of employers or employees for which it has been formed, to levy contributions not only from members but from the whole category of employers or workers whom it represents, to defend the interests of its members in disputes adjudicated in labour courts; and finally, to negotiate collective labour contracts binding upon all those engaged in the trade within the area of its jurisdiction. The contracts must cover such matters as their own duration, disciplinary regulations, hours of work, weekly rest, annual holidays with pay, wages, and the treatment of workers in cases of sickness.

(ii) *Federations* Syndicates of employers and syndicates of workers are grouped separately into federations to co-ordinate the activities of the syndicates, each with a council, an executive committee and a president or secretary.

(iii) *Confederations* The federations are in turn organized into nine confederations. Four of these represent employers in Industry, Agriculture, Commerce, and Credit and Insurance, four represent workers in these same fields; the ninth represents professional men and artists. Each confederation has a national congress and a governing body.

(iv) *Corporations* Up to this point the employers and workers are organized separately in parallel organizations. They are brought together in the 'corporations of category', each consisting of an equal number of representatives from employers and workers in a particular branch of trade plus a few technical experts and members of the Fascist party. Each is presided over by someone appointed by the Head of the Government. There are twenty-two corporations covering such branches of production as fruit-growing, oil, livestock, timber, textiles, forestry, paper-making and printing, building, fisheries, water, sea and air transport, inland communications, and so on. Their function is to advise the Government on industrial questions generally and, in particular, to help adjust disputes between capital and labour, to regulate wages, hours of labour and the conditions of employment within their respective branches, and to promote vocational education.

(v) *The National Council of Corporations* This consists of the most important members (about 500) of the corporations. It serves to co-ordinate the activities of the corporations in all important matters of economic policy and to settle such conflicts as may arise between various branches of national economy, for instance, between agriculture and industry.

### *The Fascist and Corporative Chamber*

Now to resume the description of the structure of government. The Chamber consists of some 650 members drawn from three groups: from members of the Grand Fascist Council, from the National Council of the Fascist party and from the National Council of Corporations. The Fascist and Corporative Chamber takes the place of the former Chamber of Deputies (abolished in 1938). Measures approved by the Grand Fascist Council are debated in the Chamber as well as in the Senate. As has been noted earlier, a bill rejected by the Chamber may, nevertheless, be submitted to the Senate for its consideration. After three months, a rejected bill may be referred to it again for decision by ballot (without discussion), but no subject can be discussed by the Chamber without the previous sanction of the Head of the Government. Clearly, the Parliament of Italy merely serves to confirm the decisions made by the Executive.

*The Judiciary*

Like most other European countries, Italy has two sets of courts, the ordinary and the administrative. The Court of Cassation is the highest ordinary court, the Council of State is the highest administrative court

*General aspects*

Italy is a fascist State, it is therefore an authoritarian State. Authority is exercised for the sake of the community, but is not derived from the community. It is, further, a one-party State. The constitution is hardly democratic only one political party is legally recognized; the Opposition hardly exists; the rights of free speech, free publication and free association are severely curtailed to suit the purposes of the State. It emphasizes the power of the Executive at the expense of the Legislature. The State is totalitarian, recognizing no limits to its activity. The economic structure and the political structure of the State are inextricably connected.

The system of government in Italy is instructive to the student of Political Science as containing many novel features. The most important of these is, clearly, the corporative structure of the State. A second is the intimate connexion between the Party and the State. This connexion may be noticed in (i) the combination in one person of the Head of the Party and the Head of the Government, (ii) the appointment of the secretary of the Party by royal decree on the nomination of the Head of the Government; (iii) the organization and powers of the Grand Fascist Council, and (iv) the composition of the Fascist and Corporative Chamber. Finally, the position of the Head of the Government, his relations to the ministry and the relations of the ministry both to the Head of the Government and to the Legislature, if not unique, are not usual in modern constitutions.

## §5 THE CONSTITUTION OF THE U.S.S.R.

At the beginning of the present century, Russia,<sup>1</sup> as she was then known, was an autocracy, the Tsar being the source of all authority in the State. There were, however, liberal groups in the country clamouring for reform. Their demand became so

<sup>1</sup> The present name of the State, the Union of Soviet Socialist Republics, was first adopted in 1922; Russia is one-(and the most important) unit in this federation

insistent after the defeat of Russia in the Russo-Japanese war (1904-5), that the emperor Nicholas II issued a manifesto on 17 October 1905, granting to his people the fundamental civil liberties—freedom from arbitrary arrest, freedom of opinion, of the press, of assembly and organization. The manifesto also promised an extension of the franchise for elections to the State Parliament (the Duma), and announced the ‘immutable rule that no law shall become effective without the approval of the State Duma and that the elected representatives of the people shall be given the opportunity to participate effectively in the control over the activities of the officers appointed by Us [the Crown] to ensure the conformity of such activities with the law’<sup>1</sup>. The hopes engendered by this announcement were never fulfilled, at the beginning of the first World War (1914), Russia still remained an autocracy, the Parliament being powerless either to pass the laws it liked or to control the Executive. The administration was corrupt, the masses were poor and illiterate, and the educated classes were completely divorced from them. The defeat of Russia in the war was a death-blow to the monarchy. The revolutionary parties in the State exploited the opportunity, and the Tsar abdicated on 2 March 1917. This was the first stage of the Russian Revolution. From March to October, a provisional government, headed by Kerensky and consisting of ‘the flower of Russian Liberalism’, functioned, its authority, however, was seriously questioned by radical revolutionary groups headed by the Petrograd Soviet (Council) of Soldiers’ and Workmen’s Deputies, deriving their inspiration from the communist philosophy of Karl Marx. In October came the second stage of the Russian Revolution when the Bolsheviks<sup>2</sup> (headed by Lenin) captured power and established a socialist State. They have ever since remained the masters of the State.

From 1917 up to the present day the government of Russia has undergone many changes into which it is unnecessary to enter in this context. It is sufficient to outline the main features of the present constitution adopted on 5 December 1936.

<sup>1</sup> M. T. Florinsky, *Toward an Understanding of the U S S R*, pp. 11-12.

<sup>2</sup> This word means ‘majority’ and was first used to indicate the majority of the Russian Social-Democratic Labour Party, who differed from the minority (the Mensheviks) at the Party Congress held in 1903, first over minor questions of organization and later also over important issues of social policy.

The U S S R is a federal State consisting of sixteen soviet socialist republics.

The constitution can be amended by decisions of the Supreme Soviet (the national Parliament), adopted by a majority of not less than two-thirds of the votes in each of its chambers. It is thus technically a rigid constitution, though the particular method of amendment cannot be considered as making it difficult to bring about constitutional changes.

The division of powers between the Union and the units follows the model of the U S A in principle, the powers of the former being enumerated and the residue being vested with the latter. The most important of the subjects decided by the Union are war and peace, foreign affairs,<sup>1</sup> admission of new republics into the U S S R, defence, foreign trade on the basis of State monopoly, establishment of national economic plans of the U S S R, administration of banks, industrial and agricultural establishments, and trading enterprises of all-Union importance, administration of transport and communications, direction of the monetary and credit system, organization of State insurance and laws regarding citizenship of the Union. Besides these, the Union may also establish fundamental principles for (i) the use of land as well as the exploitation of its deposits, forests and waters, (ii) the maintenance of public health, and (iii) labour legislation.

An interesting, and perhaps unique, feature of the position of the constituent units in the U S S R is that they have the right freely to secede from the U S S R. It is doubtful if this is of any practical significance, for leaders of the Communist Party, including Stalin, have publicly expressed the view that the federation of Soviet Republics is but a transition stage towards complete unity, and that the right of secession must be interpreted in the light of the need for strengthening the U S S R.<sup>2</sup>

The highest executive organ of the State is the Council of People's Commissars elected at a joint sitting of the two chambers of the Supreme Soviet (the Parliament) and responsible to

<sup>1</sup> Mention may be made of a resolution passed by the Supreme Soviet on 1 February 1944 that the Republics of the Soviet Union should be able to establish autonomous relations with foreign countries and to have independent army units. This suggests that the units will have some voice in foreign affairs, though its precise significance is not yet clear.

<sup>2</sup> Florinsky, *op cit*, p. 91.

it, and, between sessions of the Supreme Soviet, to its committee, the Presidium. Its powers include the direction and co-ordination of the work of the federal departments; execution of the national economic plan, the administration of the monetary and credit system, the maintenance of public order, the defence of the interests of the State and of the rights of citizens, general supervision in the sphere of relations with foreign States, the direction of the general organization of the armed forces of the country and the setting up, when necessary, of special committees and other administrative organs to deal with economic, cultural, and military matters. It may suspend the orders and resolutions of the Councils of People's Commissars of the constituent republics if such orders and resolutions violate federal laws or decrees.

The Legislature of the U S S R, the Supreme Soviet, consists of two Houses, the Soviet (Council) of the Union and the Soviet (Council) of Nationalities. The Soviet of the Union has 569 members, elected by the citizens of the Union by territorial districts on the basis of one deputy for every 3,00,000 of the population. The Soviet of Nationalities has 574 members, elected by the citizens of the Union by constituent and autonomous republics, autonomous provinces, and national regions<sup>1</sup> on the basis of twenty-five deputies from each constituent republic, eleven deputies from each autonomous republic, five deputies from each autonomous province, and one deputy from each national region. The right to vote is given to all citizens, men and women, who have reached the age of eighteen, irrespective of race and nationality, religion, educational qualifications, residence, social origin, property, status, or past activity, with the exception of insane persons, and persons condemned by a court to deprivation of electoral rights. Every citizen has only one vote. Voting at elections is by secret ballot. The right to stand as a candidate for election is given to all voters. Candidates are nominated by one of the following bodies—public organizations and societies of working people; Communist party organizations; trade unions, co-operatives, youth organizations and cultural societies. The term of both Houses is four years, unless

<sup>1</sup> The autonomous republics, autonomous provinces and national regions are local divisions within the constituent republics with varying degrees of autonomy in local affairs.

they are dissolved earlier by reason of irreconcilable differences between them

The Supreme Soviet exercises all the powers vested in the Federal Government, except those delegated by the constitution to other organs of that government. Normally it meets twice a year. The two Houses have equal powers—the legislative initiative belongs in an equal degree to both, and a law is considered adopted if passed by a simple majority in each House. In case of disagreement between the two bodies, a conciliation committee, consisting of an equal number of members from both Houses, is appointed to explore points of agreement, if its decision does not satisfy one of the chambers, the question is considered a second time in the chambers, and, if differences still continue, the Supreme Soviet is dissolved and a fresh election held. At a joint sitting of both Houses, the Supreme Soviet elects the Council of People's Commissars, the Presidium (explained below), and the Supreme Court of the U S S R—the highest tribunal of the land.

The Presidium is an interesting innovation of the Soviet constitution. It consists of thirty-seven members elected by the Supreme Soviet, and continues in office until the election of the new Presidium. Its functions are primarily administrative, but also partly legislative. It convenes two ordinary sessions of the Supreme Soviet a year, and special sessions at its discretion or on the demand of one of the constituent republics, it dissolves the Supreme Soviet when its two chambers fail to agree, and arranges for fresh elections, it arranges referendums on its own initiative or on demand by one of the constituent republics, in the intervals between sessions of the Supreme Soviet it removes from office and appoints People's Commissars, subject, however, to subsequent confirmation by the Supreme Soviet; it awards titles, exercises the right of pardon, appoints and replaces the high command of the armed forces and, in the intervals between sessions of the Supreme Soviet, it declares war; finally it has power at any time to order mobilization, ratify international treaties and appoint or recall ambassadors. It has power to interpret existing laws of the U S S R, issue decrees and rescind decisions and orders of the Council of the People's Commissars of the U S S R, and of the Councils of People's Commissars of the constituent republics, in case they do not conform to the

## §5 ] *THE CONSTITUTION OF THE U.S.S.R.*

law This last provision is a significant one, for, while providing against the admitted danger of allowing the Executive unfettered discretion in the making of policy, it leaves the validity of executive action to be declared, unlike in Britain and the United States, by legislative, not by judicial, decision

The organization of the Judiciary differs somewhat from that prevalent in other States The Supreme Court of the U.S.S.R., the highest court in the land, consists of 45 judges<sup>1</sup> and 20 assessors elected by the Legislature for a term of five years The judges of lower courts are similarly elected, by primary voters or by regional soviets, for a period of three to five years They may, however, be recalled by the bodies that elected them or by a decision of the higher courts<sup>1</sup> The judges are declared<sup>2</sup> to be independent, 'subordinate only to the law'. It is also noteworthy that, as in Switzerland, the Supreme Court has no power to declare the Union law unconstitutional, for the constitution says<sup>3</sup> that 'in case of conflict between a law of a constituent republic and a law of the Union, the all-Union law shall prevail'.

### *Economic life*

The U.S.S.R., it will be recalled, is a socialist State. The economic foundation of the U.S.S.R., the constitution declares, consists of the socialist economic system and the socialist ownership of the tools and means of production, which has been firmly established as a result of the liquidation of the capitalist economic system, the abolition of private ownership of the tools and means of production, and the abolition of the exploitation of man by man. Socialist property takes two forms State property and the property of collective farms and co-operative organizations The land, its deposits, waters, forests, mills, factories, mines, railways, water and air transport, banks, means of communication and State farms are State property Public enterprises in collective farms and co-operative organizations, with their livestock and equipment and products raised or manufactured by them, form the property of the collective farms and co-operative organizations

Industry, transport, banking and trade are thus (almost wholly) State owned and controlled and are directed by a Plan-

<sup>1</sup> Florinsky, *op cit*, p 133

<sup>2</sup> Article 112

<sup>3</sup> Article 20



ning Commission Agriculture is carried on either in State farms (in 1938 covering 8·9% of the total sown area) or in collective farms (90·2% of the total sown area). A collective farm is, in form, a voluntary co-operative agricultural association of peasants, each peasant contributing to the common stock his implements, draught animals, seed and labour, and entitled to a share of the total output. Members are, however, allowed to retain for personal use a plot of land attached to the house, and as personal property, their houses, small farm tools, and small livestock. The affairs of the farm are managed by an elected council. The agricultural economy of the U S S R. is, it will be seen, socialistic in a somewhat different sense from that applied to her industry, for it is not for the most part directed by State officials. It is socialistic in the sense that (i) all agricultural land is owned by the State; (ii) a small part of it is cultivated as State farms; and (iii) private enterprise and the employment by any one of another's labour for his private profit do not exist in the other and larger part of it, viz the collective farms. Further, the land occupied by collective farms is public property, secured to them 'without payment and without time limit, that is, for ever'.

In State-owned industries and farms, and in collective farms, the payment of wages is based on the principle 'from each according to his ability, to each according to his work'.

It is noteworthy that alongside the socialist economy, which covers more than ninety-five per cent of the production, distribution and exchange in the U S S. R., the law permits the small-scale enterprise of individual peasants and handicraftsmen conducted by their personal labour, provided they do not employ others for their private profit.

The right to hold personal property is not altogether abolished, being permitted in income from labour and savings deposited in State banks or invested in government bonds, houses occupied by their owners, household articles and utensils, tools, furnishings, and other personal belongings.

*To what extent is the constitution democratic?*

It is sometimes claimed that the constitution of Soviet Russia is a perfect democracy. *Pro forma* the constitution is clearly democratic: universal suffrage; 'one person, one vote'; the equal eligibility of all voters to be elected (with the least num-

## §5] THE CONSTITUTION OF THE U S S R \*

ber of disqualifications found in any State); direct election to both chambers; vote by ballot, periodical elections; the election of the Executive by the Legislature and its responsibility to the Legislature, the equal eligibility to administrative and judicial offices; the election of judges and the provision for referendums provide political equality and the opportunity for all to take part in government. It is also true that the vast economic inequalities which hamper the working of democracies elsewhere have been done away with. But fundamentally and in spirit, the U S S R is not democratic, at any rate according to orthodox notions of democracy. Its affinity is rather to the totalitarian States, and this for two reasons. First, the way of life prescribed by the U S S R is totalitarian, every one must conform to the pattern of life set by the State, this is anti-democratic. The ideal of democracy is to permit a larger degree of freedom to the individual to think and express himself (differently, it may be, from the opinions held by the group in control of government) in speech and action than is permitted in the U S S R. Second, an alternative Government must be possible in a democracy, under the conditions which prevail in the U S S R, this is clearly impossible. For an alternative Government is possible only when an Opposition is allowed to exist, when parties which differ in their programme from the party in power are tolerated. In the U S S R, only the Communist party is given some constitutional status<sup>1</sup> as the union of 'the most active and politically conscious citizens from the ranks of the working class and other strata of the working people', and entitled to nominate candidates for elections. In the elections held in 1937, there was no contest at all in any one of the constituencies. Apparently, elections are not entirely free, and 'free' elections are essential to a democratic system of government. Briefly, a one-party State is the antithesis of democracy.

### *Novel features of the constitution*

The U S S R is, as Stalin said, 'an entirely novel socialist State, unprecedented in history'. Its novel features are (i) It is a socialist State; the socialist organization of its economic life is therefore its most important novel feature. (ii) The right to secede is granted by the constitution to the component units of

<sup>1</sup> Articles 126 and 141

the federation (iii) The Centre is given power to amend the constitution by a two-thirds majority of its Legislature, the units having no share in the amendment. This is somewhat uncommon in federal States (iv) There is a concentration of powers in the Supreme Soviet; it elects the Executive and the Judiciary; and the laws it passes are not subject to executive or judicial veto. The only appeal from it is by referendum to the people (v) The two chambers of the Supreme Soviet have equal powers—this is found only in Switzerland among the major States (vi) The composition and functions of the Presidium are unique (vii) The U.S.S.R. is a one-party State

## §6 COMPARISONS AND CONTRASTS

The systems of government in Germany, Italy, and the U.S.S.R., outlined above, have some striking resemblances as well as differences. In all three the State is totalitarian, there being no limits to the sphere of the State; individual freedom is at a discount. Parliament is relatively unimportant in all these States, the Executive is (whatever be the theory of the constitution) all-powerful. Further, though couched in democratic forms, they are all essentially dictatorships, alternative Governments being in practice impossible and an Opposition not being tolerated. Freedom of speech and organization is restricted. Since only one party is tolerated in each of the three countries, the party becomes in effect the ultimate organ of government and the direct source of public policy. A determined effort is made everywhere, through control of education and of the means which mould public opinion, to influence the attitude of the citizens so that it may be in sympathy with the dominant party. And, finally, the younger generation are encouraged to form groups fully in sympathy with the dominant party, and it is from these groups that the members of the party are recruited.

The differences are no less striking. Germany and Italy are fascist States; the U.S.S.R. is communist. In the former, the dictatorship arose for the preservation of class differences; in the latter, for their destruction. Therefore, fascist dictatorships leave industry for the most part under private ownership, though they subject it to rigorous State control, the communist State has necessarily to take the instruments of production under its ownership and control. Therefore, the latter implies radi-

## §6] COMPARISONS AND CONTRASTS

cally new social values in a far more fundamental sense than the fascist State, because it rests on a far more fundamental economic revolution. For, whereas fascism aims mainly at preserving old institutions that are threatened, communism seeks to establish values that are new<sup>1</sup>

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<sup>1</sup> G. D. H. and Margaret Cole, *A Guide to Modern Politics*, pp. 74-5.

## INDIA

## §1 EVOLUTION OF THE INDIAN CONSTITUTION

The year 1892 is an important landmark in the political and constitutional development of British India. The period before that date witnessed the gradual establishment of British power and of *ordered* government, the period after, the beginnings of *self-government*.

The outlines of the first period are, briefly, as follows. The East India Company, mainly a commercial concern at its foundation, came gradually to acquire territorial power. Successive charters gave it political authority. The battle of Plassey (1757) brought in its wake the assumption of the diwani<sup>1</sup> by the Company, and a system of dyarchy in Bengal, i.e. a system of dual control by the Company and the Nawab of Bengal. The Regulating Act of 1773, Pitt's India Act of 1784, and the various Charter Acts (1813-53) extended the control of Parliament over the Company's possessions in India. Finally, the Mutiny of 1857-8 resulted in the establishment of direct rule by the English Crown and the organization of an efficient bureaucracy.

Legally, the king in Parliament was the supreme law-making authority for British India; and the Secretary of State, representing the Crown, was charged with the superintendence, direction and control of all acts, operations, and concerns which related to the government or the revenues of India. The Governor-General, as head of the administration in India, was required to pay due obedience to the orders of the Secretary of State, when he protested, as Lord Mayo did in 1870, he was reminded of his subordinate position.

'The Government established in India', so runs a dispatch of the Secretary of State that year, 'is (from the nature of the case) subordinate to the Imperial Government at home. And no Government can be subordinate, unless it is within the power of the superior Government to order what is to be done or left undone, and to enforce on its officers, through the ordinary con-

<sup>1</sup> This covered the whole of the financial administration and the civil government.

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stitutional means, obedience to its directions as to the use which they are to make of official position and power in furtherance of the policy which has been finally decided upon by the advisers of the Crown'

The Governor-General was assisted by an Executive Council

In its turn, the Central Government strictly controlled the provinces; whether from the administrative, the financial or the legislative point of view, the concentration of authority at the Centre was a cardinal feature of the constitution. Every local Government was required to obey the orders of the Governor-General in Council, and to keep him constantly and diligently informed of its proceedings and of all matters which ought in its opinion to be reported to him, or as to which he required information, and it was under his superintendence, direction and control in all matters relating to the government of its province. The governmental system was in theory 'one and indivisible'.

From 1892

The period from 1892 is best described as one beginning the slow growth of self-government. The evolution of self-government in India has two aspects. On the one hand, it involves the demand by Indians for the government of the country by and for themselves—the nationalistic idea, and, on the other, the demand for the sharing of political power by an increasing number of people—the democratic idea. The two are often combined and in practice are indistinguishable.

The stages in this evolution may easily be marked. The Indian National Congress held its first meeting in 1885, and demanded *inter alia* the presence of elected members in the Legislative Councils, the right to discuss the budget and to ask questions, and the reference to a standing committee of the House of Commons of issues between the Councils and the Governments. Bradlaugh introduced in the House of Commons a Home Rule Bill for India, at the request of the Congress. Ultimately the maximum concession then deemed possible and wise by the Government took shape in an Act of 1892, which recognized, though only indirectly and inadequately, the principle of election to both the central and the local Legislatures. The

demand for the Indianization of the Services was made and gradually conceded.

The Minto-Morley Reforms of 1909 form the next important landmark. They increased the representative element in the Legislative Councils—with a non-official majority in those of the provinces—and extended their powers; but they cannot justly be described as embodying any new policy. They were essentially of an evolutionary character; the change they introduced was one of degree and not of kind, the object being to associate the people with the Government in the decision of public questions to a greater extent than before. Lord Morley himself emphatically repudiated the idea that the Act of 1909 was in any sense a step towards parliamentary government. It is symptomatic of the moderate character of the political demands then made that the Congress welcomed the Reforms and G. K. Gokhale spoke of their 'generous and fair nature'.

Soon, however, disillusionment came; the fatal weakness of the Reforms revealed itself; they brought in an element of challenge and obstruction—influence without responsibility. The Great War (1914-18) provided an opportunity for a striking manifestation of India's loyalty and co-operation. The announcement of 20 August 1917 in Parliament was almost an inevitable result. The gradual development of self-governing institutions with a view to the progressive realization of responsible government was officially declared to be the goal of British policy in India, and the Reforms which followed embodied that principle.

The Act of 1919 introduced several changes in the constitution of India, as regards both the central and the provincial Governments. The central Legislature was made bicameral, in both the chambers, the Council of State and the Legislative Assembly, there was a majority of elected members. It also received additional powers to influence and criticize the Government. The most important change in the government of the provinces was the introduction of the system known as dyarchy. Its essence is a division of the Executive into the Reserved Half and the Transferred Half, the former responsible, through the Secretary of State for India, to the British Parliament and electorate for the administration of *certain* matters of government, the latter responsible, through the Legislative Council, to an Indian

electorate for the administration of certain *other* subjects Dyaichy was worked in several provinces until 1937, with varying degrees of success

Meanwhile steps were taken, with the appointment of the Indian Statutory Commission in 1927, to make a new constitution for India. That Commission reported in 1930. Three Round Table Conferences were summoned at London in 1930, 1931 and 1932, to discuss proposals for the making of the new constitution, and, in the light of their discussions, a White Paper was issued by the Government in 1933 laying down definite proposals for reform, which were to be submitted to a joint select committee of Parliament for examination and report. The Committee was accordingly appointed, and their *Report* was made the basis of the Government of India Act, 1935.

The present constitution of India is based partly on the Government of India Act, 1915 (as modified until 1935) and partly on the Government of India Act, 1935.<sup>1</sup> The structure of the Central Government is based primarily on the former, that of the provinces, on the latter. In the following sections of this chapter, the position of the 'Home Government' in relation to Indian affairs is first explained, the existing Central Government is next outlined, then, the proposed Federation of India, the structure and functions of the Federal and provincial Governments and of the Indian States, and the relations between these are studied, finally, two sections are devoted to a study of the machinery for amending the new constitution followed by an estimate of the new scheme.

## §2 THE HOME GOVERNMENT

Part of the constitutional machinery of the Government of India is located in Britain. This consists of (i) the Secretary of State for India and his advisers, (ii) the King in Council, and (iii) the High Commissioner for India. These together are generally termed 'the Home Government'.

(i) *The Secretary of State* is a member of the British cabinet, and, like its other members, is appointed by the Crown on the recommendation of the Prime Minister, and is responsible to

<sup>1</sup> The Government of India Act, 1915, has been repealed but the Act of 1935 enumerates in its ninth schedule the provisions of the old Act (with some modifications) which are to continue in force until the establishment of the Federation.



Parliament He is assisted by two under-secretaries, the parliamentary under-secretary and the permanent under-secretary. The former is a member of Parliament, and is usually selected from that House of which the Secretary of State is not a member so that he may explain the policy of the Government and answer questions in that House. The latter is an official of the Civil Service with a permanent tenure. He is in charge of the India Office

<sup>under-secretary</sup> The position of the Secretary of State is a pivotal one in the constitution On his recommendation, the Crown appoints <sup>or</sup> important officers such as the Governors, the judges of the <sup>the</sup> Federal Court and of High Courts, the Auditor-General and members of the Executive Council<sup>1</sup> He also issues Instruments of Instructions to the Governor-General and to the Governors<sup>2</sup> The Governor-General in Council and the Governor-General <sup>the</sup> are under the Secretary of State. Since in all matters in which the Governor of a province is required to act in his discretion, <sup>turns</sup> or to exercise his individual judgement, he is subject to 'the Governor-General in his discretion', who, in turn, is under the control of the Secretary of State for India, it follows that, indirectly, the Governor of a province is under the control of the Secretary of State whenever he acts in his discretion or in his individual judgement The recruitment to such services as the Indian Civil Service, the Indian Medical Service (Civil) and the Indian Police and to certain other posts<sup>3</sup> is made by the Secretary of State He has statutory duties<sup>4</sup> in regard to the laying down of the conditions of the services and of the posts to which <sup>in</sup> recruitment is made by him. He also has powers to hear appeals from any person appointed by him to a civil service or a civil post 'against any order made by any authority in India which <sup>in</sup> punishes or formally censures him, or alters or interprets to his disadvantage any rule by which his conditions of service are regulated'. He borrows money in England on behalf of India.

<sup>ed</sup> The Secretary of State is advised by Advisers whom he ap-

<sup>1</sup> The Secretary of State also signs the Commission of Appointment of the Governor-General, but the Governor General is in reality nominated by the Prime Minister

<sup>2</sup> These Instruments cannot, however, be issued or amended without the express sanction of Parliament Sections 13 and 53

<sup>3</sup> Section 244

<sup>4</sup> Sections 248 to 263

points, their number now being ten<sup>1</sup> One half at least of the Advisers must be persons who have held office for a minimum of ten years under the Crown in India and have not ceased to perform their official duties in India under the Crown for more than two years before the date of their appointment as Advisers. They hold office for five years and are not eligible for reappointment. Their function, as their name indicates, is to advise the Secretary of State on matters which he refers to them. In the exercise of his powers with reference to the Services, the Secretary of State is bound to act with the concurrence of his Advisers, in the exercise of his other powers, it is in his discretion whether or not he consults with them on any matter, and, if so, whether he consults with them collectively or with one or more of them individually, and whether or not he acts in accordance with any advice given to him by them<sup>2</sup>

(ii) *The king in Council* Authority is given by the constitution to the king in Council to regulate many matters. Thus, in the period of transition which must elapse before the federation is established, it is lawful for the king in Council 'to provide for modifications in the Act and in the provisions of the Government of India Act still in force, to provide for a limited period that sufficient funds shall be available to all the Governments in India (and Burma), and to make other temporary provisions to remove difficulties which emerge'.<sup>3</sup> The orders in Council (with certain exceptions) must be laid before both Houses of Parliament, and an order can only issue (except in an emergency) after approval by both Houses with or without amendment. It need not be added that the Secretary of State has in practice the chief voice in shaping the substance of the Orders in Council.

(iii) *The High Commissioner for India* is appointed by the Governor-General in his individual judgement,<sup>4</sup> normally for five years. He acts as the agent of the Central Government and

<sup>1</sup> The number may vary between 8 and 12, after the inauguration of Federation their number will be not less than three or more than six. Sections 278 and 314

<sup>2</sup> Section 278(b) In the transitional period between the commencement of Part III of the Act and the establishment of the Federation, the Secretary of State is to be guided by his Advisers, apart from matters relating to the services, in matters relating to finance also. Sections 314(2) and 315

<sup>3</sup> Section 310, A. B. Keith, *A Constitutional History of India, 1600-1935*, p. 436

<sup>4</sup> Section 302

of the provincial Governments, and performs other 'functions hitherto carried out in the office of the Secretary of State which might be assigned to him by that officer'. Essentially his duties are non-political. He has to procure stores for Indian Governments, supply trade information and promote Indian trade, and look after the welfare of Indian students in England. He also represents India at international conferences, etc., when deputed to do so.

*formal  
non-deputed*

### §3 THE CENTRAL GOVERNMENT

The Governor-General in Council is the Central Executive.

The Governor-General is appointed by the Crown on the advice of the Prime Minister, normally for five years.<sup>1</sup> The importance of the office is perhaps best expressed in a letter written by Lord Lansdowne, a former Governor-General, to his mother in 1888: 'I am offered a magnificent post, the most responsible and honourable in the service [ of the Crown ] outside England' <sup>2</sup> The powers of the Governor-General may be enumerated under two heads

(i) *In relation to the Administration* As head of the Administration, he has power to frame rules for the transaction of business in his Executive Council, to allocate portfolios among its members, and to limit their scope. While normally he is bound by the decisions of that Council, he is authorized to reject them if in his judgement the safety, tranquillity and interests of British India, or any part thereof, are essentially affected. He is usually in direct charge of the Foreign department, which concerns itself with the relations of India with foreign countries. He also holds the office of the Crown Representative; <sup>3</sup> as such, he is 'the link between British India and the Indian Princes; in this connexion ceremonial visits and personal interviews take up much of his time'.

(ii) *In relation to the Legislature.* He summons, prorogues and dissolves the Indian Legislature and may extend its term beyond the prescribed period. He may prohibit the introduction or the discussion in that Legislature of any bill, or any amend-

<sup>1</sup> The period is fixed by convention

- Cited in the *Report of the Indian Statutory Commission*, Vol. I, p. 177n

<sup>2</sup> See below, §8. The two offices—of the Governor-General and of the Crown Representative—need not necessarily be combined in the same person, though at present they are

ment to a bill, if he considers that the bill or the amendment affects the safety or tranquillity of British India. He may withhold his assent from any central bill or reserve such bills for His Majesty's pleasure. He may similarly withhold his assent from any provincial bill reserved by the Governor for his assent, or reserve them in his turn for His Majesty's pleasure (Certain classes of bills *must* be reserved by him.) His previous sanction is required for the introduction of certain classes of bills<sup>1</sup> in the central and provincial Legislatures. Where either chamber of the Indian Legislature refuses leave to introduce any bill, or fails to pass it in a form recommended by the Governor-General, the Governor-General may pass it into law by certifying that such passage is 'essential for the safety, tranquillity or interests of British India or any part thereof'. He has powers in an emergency to legislate by ordinance, without consulting the Legislature, such powers having effect for not more than six months<sup>2</sup>. In respect of financial matters, he decides, with the assent of his Council, what items of central expenditure are to be classified as votable, and what as non-votable. In respect of votable items, he may, with the assent of his Council, restore grants refused by the Assembly; and he may, on his own initiative, authorize such expenditure as he thinks to be necessary for the safety or tranquillity of British India or any part thereof. Finally, he nominates about forty members to the Assembly and twenty-six to the Council of State.

These are the principal legal powers of the Governor-General, but no mere list of powers, says the Indian Statutory Commission,<sup>3</sup> can convey the full importance of his office or the range of his individual authority.

'The course of Indian politics is profoundly affected by his personality and influence. By the use of interviews and conversations and by his constant personal intervention many a political crisis is averted, and resort to his legal prerogatives is often thereby made unnecessary. Very few days pass without visits by leading men in public life to the Governor-General, and every grave political event comes under his notice and study. He takes occasional opportunities of laying his views before the central

<sup>1</sup> See section 108

<sup>2</sup> The six months limitation to ordinances has been abrogated during the present war by the India (and Burma) Emergency Provisions Act, 1940

<sup>3</sup> *Report*, Vol I, p. 178

Legislature by direct address. Furthermore, he is in constant communication with the Governors of provinces.'

### *The Executive Council*

The Governor-General is assisted by the Executive Council. The Council must be composed of at least four members. There is, however, no maximum fixed; at present it has fourteen members. Members are appointed by His Majesty on the advice of the Secretary of State for India, the Secretary of State is normally guided in his turn by the advice of the Governor-General of India. By convention, members normally hold office for a period of five years. At least three of them must be persons who have been for not less than ten years in the service of the Crown in India, and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland, or a pleader of a High Court, of not less than ten years' standing.

The Council works under the portfolio system. Each member is in charge of one of the following subjects: War, Defence, Finance, Commerce, War Transport, Labour, Law, Home Affairs, Supply, Posts and Air, Indians Overseas, Civil Defence, and Education, Health and Lands.<sup>1</sup> Routine and minor administrative matters in each portfolio are decided by the member in charge; matters on which there is difference between two or more departments, those in which the Governor-General differs from a department, proposals for legislation, and dispatches to the Secretary of State must be decided by the Council. The Council also decides matters referred to it by the Governor-General in his discretion. At the meetings of the Council, the Governor-General, or in his absence the Vice-President (or in his absence the senior member other than the Commander-in-Chief), presides. Each member has one vote, but, in the case of a tie, the person presiding has a second or casting vote. Normally, however, the taking of formal votes is not resorted to, as decisions are invariably reached by agreement.<sup>2</sup> It need not be added that a vote must be taken if there is considerable difference of opinion.

Mention has been made elsewhere of the fact that, while the Governor-General is normally bound by the decisions of the Executive Council, he is authorized to reject them if in his

<sup>1</sup> One member represents India in the British War Cabinet

<sup>2</sup> A. B. Rudra, *The Viceroy and Governor-General of India*, p. 119

judgement the safety, tranquillity or interests of British India; or any part thereof, are essentially affected.

The responsibility of the Governor-General in Council is in a sense collective, orders of the Government are issued in the name of the Governor-General in Council; and 'all members of the Council are expected to defend and justify the policy and administrative actions of the Government, irrespective of the department in which they originate'<sup>1</sup> They are, therefore, expected to share in the decisions regarding such policy or action. But it will be obvious that this 'collective responsibility' is of a different kind from that of a parliamentary cabinet of the British type, for members of the Executive Council are not responsible to the elected (Indian) Legislature, nor are they drawn from one homogeneous party.

### *The Legislature*

The Indian Legislature consists of the Governor-General, the Council of State, and the Legislative Assembly.

The Council of State has 58<sup>2</sup> members, 32 of whom are elected. The remainder is nominated, but not more than 20 of these can be 'official' members. The concern of the framers of the Act of 1919 and the rules made thereunder was to secure for the membership of this body a character as closely as possible approximating to a 'Senate of Elder Statesmen', and thus to constitute a body capable of performing the function of a true revising chamber. With this object, in addition and as an alternative to a high property qualification,<sup>3</sup> the rules admit as qualifications for voters certain personal attributes which are likely to connote the possession of some past administrative experience or a high standard of intellectual attainment. Examples of these qualifications are past membership of either chamber of the Legislature as now constituted, or of its predecessor, or

<sup>1</sup> Rudra, *op cit*, p. 109.

<sup>2</sup> The maximum allowed is 60, before the separation of Burma from India, the Council consisted of 60 members.

<sup>3</sup> The rules vary from province to province. In Madras, a person who has in the province an estate the annual income from which is not less than Rs. 3,000, or is a pattadar or inamdar of land in the province on which the assessment is not less than Rs. 1,500 or receives from the Government a malikana allowance the annual amount of which is not less than Rs. 3,000, or was in the previous year assessed on his own account to income-tax on a total income of not less than Rs. 20,000, is qualified to be a voter, if he has resided in the province for not less than 120 days in the 'previous' year.

of a provincial Legislature, the holding of high office in local bodies (district boards, municipalities and corporations); membership of the governing bodies of universities, and the holding of titles conferred in recognition of Indian classical learning and literature.<sup>1</sup>

Elections are not held on a general ticket throughout British India. The seats are distributed among the provinces and, within each province, among communities and interests. Thus of the five elective seats allotted to Madras, four are non-Muslim, and one is Muslim, of the six allotted to Bombay three are non-Muslim, two are Muslim, and one is for European Commerce, and so on.

The term of the Council is five years, it may, however, be dissolved earlier by the Governor-General, or he may extend its life.

The Legislative Assembly has 141 members,<sup>2</sup> 39 nominated (of whom 26 'shall be' officials) and 102 elected.

The franchise for the Assembly, like that for the Council of State, varies from province to province.<sup>3</sup> In the main it too is based on a property qualification, which, however, is much lower than for the Council of State. As for the Council, the elective seats are distributed among the provinces and, within each province, among communities and interests.

The term of the Assembly is three years, though its life may be extended or reduced by the Governor-General.

### *Powers of the Legislature*

The powers of the Indian Legislature may be discussed under three heads

(i) *Legislative* It has power to make laws for the whole or any part of British India, but this legislative power is subject to the following restrictions (a) It does not apply to the exclusively provincial subjects listed in the Government of India

<sup>1</sup> *The Indian Year-book*, 1941-2

<sup>2</sup> Before the separation of Burma, it had 145 members

<sup>3</sup> In the General Constituencies of the Madras province, other than those of Madras city, a person is qualified as an elector who is neither a Muslim nor a European and who has resided in the constituency for not less than 120 days in the previous year and who pays land revenue of not less than Rs 50, or who was, in the previous year, assessed to income-tax or assessed in a municipality (included in the constituency) to an aggregate amount of not less than Rs 20 in respect of property tax, tax on companies, or profession tax

Act, 1935<sup>1</sup> (b) The Governor-General may prohibit the introduction in the Legislature of any bill or amendment to a bill, as noticed earlier.<sup>2</sup> (c) The previous sanction of the Governor-General in his discretion is necessary for the introduction into, or moving in, either chamber of any bill or amendment which repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India, or which affects the procedure for criminal proceedings in which European British subjects are concerned, etc.<sup>3</sup> (d) Bills passed by the Legislature may be vetoed by the Governor-General, or reserved by him for the signification of His Majesty's pleasure thereon (e) Bills which the Legislature refuses to consider or pass may be certified by the Governor-General as essential for the safety, tranquillity or interests of British India, or any part thereof, and, on receiving his assent, become law, the only restriction on the power of certification being that the measure certified has ordinarily to be laid before both Houses of Parliament, and has no effect until it has received His Majesty's assent (f) Without consulting the Legislature, the Governor-General has power in an emergency to legislate by ordinances, having effect for not more than six months<sup>4</sup>

(u) *Financial* All proposals for raising revenue are embodied in finance bills, and submitted to the Legislature for discussion and vote. If they are rejected by one or both chambers they may nevertheless be certified (like any other bill) by the Governor-General as essential, and thereby become law. Regarding the expenditure of public money, the budget, showing the estimated revenues and expenditure of the Government of India, is presented annually to both the chambers for discussion. The proposals for expenditure are divided into two parts, the votable and the non-votable. The most important of the non-votable items are (a) interest and sinking fund charges on loans, (b) expenditure of which the amount is prescribed by or under any law, (c) salaries and pensions payable to, or to the dependants of, persons appointed by or with the approval of His Majesty, and to Chief Commissioners and Judicial Commissioners.

<sup>1</sup> See below, §4

<sup>2</sup> See §3 of this chapter and section 672A of the Ninth Schedule to the Act

<sup>3</sup> See section 108 (1) read with 313 (4)

<sup>4</sup> The six months limitation has now been abrogated as explained earlier; see above, p 397, n 2



(d) expenditure classified by the order of the Governor-General in Council as relating to ecclesiastical affairs, external affairs, defence, or tribal areas. The votable demands for grants are submitted to the vote of the Assembly only. If, however, the Assembly declines to vote a demand put before it, the Governor-General in Council is empowered to declare that he is satisfied that the demand which has been refused is essential to the discharge of his responsibilities, thereupon the Government of India acts as though the demand had received the assent of the Assembly. Further, the Governor-General can, in cases of emergency, authorize such expenditure as may, in his opinion, be necessary for the safety or tranquillity of British India or any part thereof.

(iii) *Ventilative*. Members of both the chambers have the right by means of questions, resolutions, and motions of adjournment (subject to certain restrictions) to draw the attention of the Executive to certain felt grievances and needs of the people. Questions are addressed to the members of the Government in order to get information and to draw public attention to defects in the administration. Resolutions are recommendations to the Executive to get certain things done, or to leave things undone, in the interests of the people. A motion of adjournment relates to a definite matter of public importance, and, as the phrase implies, serves to focus attention on a matter which requires immediate attention on the part of the Executive.

Finally, it need hardly be mentioned that the Indian Legislature occupies a definitely subordinate position to that of the Executive. That Executive is not responsible to the Legislature, and is vested with every power—legislative, administrative, and financial—to carry on the government irrespective of the wishes of the Legislature. It may be, and frequently is, influenced by the wishes of the Legislature; but those wishes are in no way binding on it.

### *Relations between the chambers*

The chambers have equal power in respect of ordinary bills, each being authorized to initiate, amend, reject, or pass the bills which come from the other chamber. Differences are settled by joint committees and joint sessions. Demands for grants, however, only require the vote of the Assembly.

The most important change that the Government of India Act of 1935 provides for in the political system of India is the constitution of a Federation by a proclamation of His Majesty, when two conditions are fulfilled (i) An address in that behalf must have been presented to the king by each House of Parliament (ii) Rulers of states representing not less than half of the aggregate population of the states and entitled to not less than half the seats to be allotted to the states in the federal upper chamber must have signified their desire to accede to the Federation

If the Federation is constituted, its units will be the eleven British Indian provinces and such of the states as shall have signified their willingness to join it, each by executing an Instrument of Accession In this Instrument will be set out those matters which the ruler accepts as being within the scope of federal powers, subject to those limitations, if any, desired by the ruler and agreed upon by His Majesty It may be added that the entry of the states into the federation is voluntary, while that of the provinces is not.

The division of powers between the Centre and the units is unlike the division in any other federation. In the federations known to history, the Federal Government exercises, *vis-à-vis* the units, identical legislative, administrative and financial powers. No difference is generally made as between one unit and another. But in the Indian federation things are different To take, first, legislative powers The subjects in respect of which the federal Legislature can pass laws for the federated states<sup>1</sup> not only differ from those in respect of which it can pass laws for the provinces,<sup>2</sup> but they may also differ as between one federated state and another. This, indeed, follows from the fact already noticed, that the subjects in respect of which the Federal Government can exercise authority over any federated state are determined by its particular Instrument of Accession It ought also to be noticed that there is provision<sup>3</sup> in the Act to prevent wide variations, for His Majesty can refuse to accept an Instrument of Accession if it appears to him that the terms thereof are inconsistent with the

<sup>1</sup> Such items as are accepted by each federated state in Seventh Schedule, List I, of the Government of India Act 1935

<sup>2</sup> *ibid*, Lists I & III

<sup>3</sup> *ibid* section 6(4)

scheme of federation outlined in the Act. There is also the clear recommendation<sup>1</sup> of the Joint Committee that Instruments of Accession should, as far as possible, follow a standard form. Even assuming this is followed, it is significant that His Majesty's Government could not give an assurance to the Joint Committee that the states would accept all the subjects in the federal list, at best they would cede to the Federation only 48 subjects.

In relation to the provinces the federal Legislature can legislate on 95 subjects, including 36 in the concurrent list.<sup>2</sup>

There is yet another differentiation. In respect of subjects in the federal legislative list, the provinces cannot legislate, while the states apparently<sup>3</sup> can (in those accepted by them as federal), they, in effect, having concurrent power in respect of them. This, of course, would be an anomaly but for the provision that if any law of a federated state is repugnant to a federal law which extends to that state, the federal law shall prevail and the law of the state to the extent of the repugnancy be void.

To take up next the residuary power elsewhere, it is located, as has been noticed, either in the Centre as in Canada, or in the units as in the U S A, Australia and Switzerland. In India the residue, if any, (as between the Federation and the provinces) is allotted neither to the Centre nor to the provinces, the provision is that the Governor-General in his discretion may empower the federal Legislature or a provincial Legislature to enact a law in respect of any matter not enumerated in the Federal,

<sup>1</sup> *Report of the Joint Committee on Indian Constitutional Reform* (session 1933-4), Vol I, part I, para 156

<sup>2</sup> The most important federal, provincial, and concurrent subjects are as follows

*List I Federal Legislative List* Naval, military and air forces, external affairs, ecclesiastical affairs, currency, coinage and legal tender, public debt of the Federation; posts and telegraphs, census, emigration and immigration, federal railways, maritime shipping and navigation, explosives, corporations, development of industries, where development under federal control is declared by federal law to be expedient in the public interest, insurance (with exceptions), banking (with exceptions), naturalization

*List II Provincial Legislative List* Public order, police, prisons and reformatories, public debt of the province, local government; public health and sanitation, education, agriculture, forests, fisheries, trade and commerce within the province, land revenue

*List III Concurrent Legislative List* Criminal law, marriage and divorce, transfer of property, newspapers, factories, welfare of labour; trade unions; unemployment insurance, electricity

<sup>3</sup> See *Report of the Joint Committee on Indian Constitutional Reform* (session 1933-4) Vol I, part I, para 236

Provincial or Concurrent Legislative lists, the residuary powers in the case of the states are with the rulers thereof

Again, the Federal Government has more administrative powers over the provinces than over the states. Thus federal laws can be administered by federal officials in the provinces; even in the administration of the provincial subjects, the Governor (in so far as he exercises power in his discretion or in his individual judgement) is placed under the general control of the Governor-General in his discretion. On the other hand, federal laws may be administered in the states by the rulers thereof

Finally, in financial matters, while a surcharge on income-tax for federal purposes may be levied on the people of the provinces by the Federal Government, the Act provides only for the payment by each federated state (in which taxes on income are not leviable by the Federal Government) of an equivalent contribution to the revenues of the Federation. Further, while the corporation tax may be levied from the provinces by the Federation, states are exempted from it for the first ten years; and after that period, the ruler of a state has the option of saying that the tax shall not be levied in his state but that, in lieu thereof, he will pay an equivalent contribution to the revenues of the Federation

## §5 THE FEDERAL GOVERNMENT

The establishment of the Federation also necessitates the establishment of a federal Executive, a federal Legislature and a federal Court

### *The federal Executive*

The executive authority of the Federation is vested in the Governor-General as the representative of the king. The Governor-General will be appointed by His Majesty, the appointment will be made, as in fact it is now, on the advice of the Prime Minister, and normally for five years

In the discharge of his administrative functions in respect of defence, ecclesiastical affairs, external affairs (excluding the relations between the Federation and any part of His Majesty's dominions), and the tribal areas, the Governor-General is to act in his discretion (i.e. he may or may not consult anyone, if he

consults his ministers, or others, he is not bound to take their advice) These are the 'reserved subjects'. To assist him in the exercise of these functions, he may appoint Counsellors (not exceeding three in number) who will be responsible to him alone, and will not share the responsibility of the federal ministers to the federal Legislature

The Governor-General is to exercise all his other functions with the aid and on the advice of a Council of Ministers (not exceeding ten in number) subject to the retention by the Governor-General of the special powers and responsibilities vested in him by the Act. The ministers must be, or within six months become, members of the federal Legislature. The Governor-General is directed by his Instrument of Instructions<sup>1</sup> to select them in consultation with the person who, in his judgment, is most likely to command a stable majority in the Legislature, and to appoint those persons (including, so far as practicable, representatives of the federated states and members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature. But, in so acting, he is also asked to bear in mind the need for fostering a sense of joint responsibility among his ministers. The ministers are, legally, to hold office during the pleasure of the Governor-General. It is clear, however, that the intention of the Act is that ministers must, on the principles of parliamentary government, be in practice responsible to the Legislature in respect of the 'transferred subjects'.

The ministers, however, are not free to administer the 'transferred subjects' in accordance with their own and the Legislature's wishes. They are limited by the special responsibilities of the Governor-General, the most important of which are :

(i) The prevention of any grave menace to the peace or tranquillity of India or any part thereof

(ii) The safeguarding of the financial stability and credit of the Federal Government

(iii) The safeguarding of the legitimate interests of minorities

(iv) The securing to, and to the dependants of, persons who are or have been members of the public services of any rights

<sup>1</sup> Issued by His Majesty to the Governor-General

provided or preserved for them by or under the Act, and the safeguarding of their legitimate interests

(v) The prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment

(vi) The protection of the rights of any Indian state and the rights and dignity of the ruler thereof

‘If and in so far as any special responsibility of the Governor-General is involved, he shall in the exercise of his functions exercise his *individual judgement*<sup>1</sup> as to the action to be taken’

It should be explained that the ‘special responsibilities’ of the Governor-General are not special departments of the Government from which the action of the ministers is excluded. A special responsibility does no more than indicate a purpose for the accomplishment of which it will be constitutionally proper for the Governor-General, after receiving ministerial advice, to signify his dissent and even to act in opposition, if in his own unfettered judgement he is of opinion that the circumstances of the case so require<sup>2</sup>

The federal Executive may properly be described as a dyarchy involving dual responsibility, with the qualification that, if the Governor-General chooses to exercise the special powers given to him by law in respect of ‘transferred subjects’, the effective sphere of ministerial responsibility to the Legislature will be considerably curtailed

### *The federal Legislature*

The federal Legislature is to consist of two chambers, the Council of State and the House of Assembly

The Council of State will have 260 members, 156 from the British Indian provinces and (not more than) 104 from the

<sup>1</sup> Section 12 (2), italics ours. ‘Individual judgement’ differs from ‘in his discretion’ in that where the Governor-General is required to exercise his individual judgement in any matter, he is bound to consult his ministers, though not to take their advice, whereas when he is required to act ‘in his discretion’, he is not bound to consult them at all unless required by the Act to do so

<sup>2</sup> See the *Report of the Joint Committee on Indian Constitutional Reform*, paras 75, 168-71. This shifting of emphasis from department or subject to purpose or object (and the consequent all-pervading character given to special responsibilities) is noteworthy. It makes the area and the significance of responsible government as big or as small as the Governor-General wishes to make it.

states. Of the representatives from British India six are to be nominated and 150 chosen for the most part by *direct* election. The Hindu, Sikh and Muslim communities are to choose their representatives by voting in territorial constituencies, the franchise to be based on a high property qualification. The representatives of the Indian Christian, Anglo-Indian, and European communities will be chosen by the method of indirect election, i.e. by electoral colleges consisting of such Indian Christians, Anglo-Indians and Europeans, respectively, as are members of the Legislative Council of any Governor's province or of the Legislative Assembly of any Governor's province. The representatives of states are to be nominated by their rulers. The Council of State is to be a permanent body not subject to dissolution; but one-third of its members are to retire every third year, each individual member thus serving nine years.

The House of Assembly is to have 375 members, 250 from British India and (not more than) 125 from the states. The representatives from British India are in the main elected *indirectly*, i.e. by the provincial Assemblies on a communal basis, the Hindu, Muslim and Sikh members of the Assemblies electing a prescribed number of representatives to represent their respective communities. There are also separate representatives to represent other *communities*, viz. Europeans, Anglo-Indians and Indian Christians, and other *interests*, viz. commerce and industry, landholders, labour and women. The representatives of states are to be appointed by their rulers. The House of Assembly is, unless sooner dissolved, to continue for five years.

The powers of the federal Legislature are fourfold

(i) *Legislative* The federal Legislature has power to pass laws in respect of subjects included in the federal legislative list and the concurrent list. It may pass laws on the provincial list (i) for the Chief Commissioners' provinces, (ii) in an emergency, subject to the previous sanction of the Governor-General,<sup>1</sup> or (iii) when resolutions to that effect are passed by the Chambers of the legislatures of two or more provinces. Its power to pass laws for the federated states is limited by the terms of their Instruments of Accession.

Its legislative powers are, however, subject to the following limitations —(a) The previous sanction of the Governor-General

<sup>1</sup> See section 102 for details of the Act

is necessary for the introduction of certain classes of bills, such as those affecting a Governor-General's or Governor's Act or Ordinance, any matters in which the Governor-General is required to act in his discretion, or any Act relating to any police force, and so on (b) The Governor-General may refuse to give his assent to a bill, or return it for reconsideration, or reserve it for His Majesty's consent (c) His Majesty may disallow a bill reserved for his consent (d) The Governor-General may issue Ordinances valid for short periods without consulting the Legislature (e) He may issue Governor-General's Acts to enable him to discharge his functions in so far as he is required to act in his discretion or to exercise his individual judgement (f) The laws passed by it must not be inconsistent with Acts of Parliament

(ii) *Financial* In respect of financial matters also, the effective power of the Legislature is not great. Financial bills proposing taxation may be introduced only on the recommendation of the Governor-General, and when passed by the Legislature may be vetoed by the Governor-General or reserved for His Majesty's consent. Demands for grants require the consent of the Legislature, but expenditure charged on the revenues of the Federation (such as expenditure on defence, external affairs, tribal areas and ecclesiastical affairs, debt charges and the salary and allowances of the Governor-General, the federal Council of Ministers, Counsellors and others) is not subject to its vote. And even the items of expenditure which are subject to its vote, if rejected by it, may be restored by the Governor-General if, in his opinion, the rejection affects his special responsibilities.

(iii) *Ventilative* It may discuss matters of public importance, and give expression to the needs and grievances of the people by passing resolutions and adjournment motions, through discussions on the budget and on the bills, and through questions (subject to certain restrictions)

(iv) *Executive*. It may control the tenure of only one part of the Executive, i.e. the ministers, by passing 'no confidence' motions and in the last resort by the refusal of supply; but this power, as is indicated later, is in practice subject to serious limitations



*Relations between the two chambers*

The powers of both chambers are equal except in two respects (i) The demands for grants are *first* submitted to the House of Assembly, and thereafter to the Council of State (ii) Where the Assembly has refused its assent to a demand, that demand is not to be submitted to the Council of State unless the Governor-General so directs. If it passes the demand, subject to a reduction of a specified amount, only a demand for the reduced amount can be submitted to the Council of State unless the Governor-General directs otherwise.

Differences between the two chambers are to be settled at a joint session

*The federal Court*

A federation, as we have seen, clearly demands the establishment of a Court to decide conflicts of jurisdiction between the Centre and the units. As part of the Act of 1935 has already come into operation, the federal Court has already been established.

Under the Act, the federal Court is to consist of a Chief Justice of India and not more than six<sup>1</sup> puisne judges, unless an address is presented by the federal Legislature to the Governor-General asking for an increase in the number. Every judge of the Court will hold office until he attains the age of sixty-five years, but may be removed from office by His Majesty on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed. The judges' salaries, allowances, leave and pensions are determined by the king in Council, and (except as regards allowances) may not be varied after appointment to their disadvantage.

The Court's jurisdiction is threefold

(i) *Original*. It has exclusive original jurisdiction in any dispute between the Federation, any of the provinces, or any of the federated states, provided 'the dispute involves any question (whether of law or fact) on which the existence or extent

<sup>1</sup> At present there are three judges including the Chief Justice

## §6] THE PROVINCIAL GOVERNMENT

of a legal right depends' (subject, however, to certain restrictions in respect of disputes to which a federated state is a party)<sup>1</sup>

(ii) *Appellate.* (a) It has appellate jurisdiction in appeals from High Courts in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder. The federal Legislature is authorized<sup>2</sup> to enlarge the appellate jurisdiction of the Court to cover cases which do not involve an interpretation of the Act or any Order in Council (b) An appeal may lie from the High Court of a federated state primarily if it involves an interpretation of the Act or an Order in Council made thereunder or of the Instrument of Accession of that state.

(iii) *Advisory* The Court may be consulted by the Governor-General on any question of law 'which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Court upon it'. Appeals from the decisions of the federal Court may be taken to the Judicial Committee of the Privy Council, which, therefore, is the highest tribunal for India. In certain types of cases, such appeals may be allowed only with the leave of the federal Court or of His Majesty in Council.

## §6 THE PROVINCIAL GOVERNMENT

### *The Executive*

The executive authority of a province is vested in the Governor appointed by the Crown Under normal conditions,<sup>3</sup> he exercises his functions with the help and on the advice of a Council of Ministers, subject, however, to his retention of special powers and responsibilities The ministers are appointed, as federal ministers will be appointed, on the recommendation of

<sup>1</sup> The main restriction is that the dispute to which the state is a party must concern the interpretation of the Act, or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that state

<sup>2</sup> Subject to specified limitations under section 206 It may be noted that section 206, authorizing the federal Legislature to enlarge the jurisdiction of the federal Court, has not yet been brought into operation by the requisite Order in Council The question is said to be under consideration

<sup>3</sup> Section 93 provides that the Governor may issue a Proclamation in the event of a failure of constitutional machinery, declaring that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion

the leader of the party which commands a majority in the (provincial) Legislature. Legally, it is true, they hold office at the pleasure of the Governor ; the intention of the Act is that in practice they will hold office at the pleasure of the Legislature.

The position of the Governor is, according to the letter of the constitution, a very important one. He is not a mere figure-head who has simply to act on the advice of responsible ministers. In general, indeed, he is bound to act on their advice, but the constitution vests some functions in the Governor to be exercised by him *in his discretion* and others in his *individual judgement*. Among the former are his power to preside over the meetings of the Council of Ministers, to choose, summon or dismiss his ministers, to make rules for the transaction of the business of the provincial Government, to summon or prorogue the Legislature or to dissolve the Legislative Assembly, to assent to, or withhold his assent from, bills passed by the Legislature, and so on. The latter include the exercise of his special responsibilities of which the most important are : (i) the prevention of any grave menace to the peace or tranquillity of the province or any part thereof ; (ii) safeguarding the legitimate interests of minorities , (iii) securing to, and to the dependants of, persons who are or have been members of the public services any rights provided or preserved for them by or under the Act, and safeguarding their legitimate interests , (iv) the protection of the rights of any Indian state and the rights and dignity of its ruler ; (v) securing the execution of the orders or directions issued by the Governor-General in his discretion. The Governor, unlike the Governor-General, has no special responsibility for the safeguarding of financial stability and credit. When the Governor acts in his discretion or in his individual judgement, he is under the control of the Governor-General.

It ought to be explained, however, that in the field of ministerial responsibility it is 'mandatory' on a Governor to be guided by the advice of his ministers,<sup>1</sup> even though he may not himself be wholly satisfied that that advice is necessarily the right advice. Further, in matters where a Governor exercises his individual judgement, including his special responsibilities, he is bound to consult his ministers. If he is unable to accept the

<sup>1</sup> The Viceroy's statement, *The Hindu*, 22 June 1937

advice of his ministers, then the responsibility for his decision is his and his alone

‘In that event, ministers bear no responsibility for the decision and are entitled—if they so desire—publicly to state that they take no responsibility for that particular decision or even that they have advised the Governor in an opposite sense’

Finally, the intention of the Act, as has been authoritatively explained by the Viceroy,<sup>1</sup> is that under provincial autonomy, in all matters falling within the ministerial field including the position of the minorities, the Services, etc., the Governor is ordinarily to be guided in the exercise of his powers by the advice of his ministers and that these ministers will be responsible not to Parliament but to the provincial Legislature

### *The Legislature*

In Assam, Bengal, Bihar, Bombay, Madras, and the United Provinces, the Legislatures consist of two chambers the Legislative Council and the Legislative Assembly. In the other five provinces, the Legislative Assembly is the only chamber.

The number of members of the Legislative Councils naturally varies from province to province. The smallest in size is that of Assam, with not less than 21 and not more than 22, the largest is that of Bengal, with not less than 63 and not more than 65. In Assam, Bombay, Madras and the United Provinces, the members are, for the most part, directly elected from communal constituencies, a small proportion is nominated. In Bengal and Bihar, rather more than half the number of members of the Council is directly elected, about two-fifths are elected by the Legislative Assembly of the province concerned and the rest are nominated.<sup>2</sup> The franchise is in general restricted to the propertied classes.<sup>3</sup>

<sup>1</sup> *ibid*

<sup>2</sup> In Madras and Bengal the Legislative Council is composed as follows —

—	Total number	General seats	Muslim seats	European seats	Indian Christian seats	Seats filled by election	Seats filled by Governor's nomination
MADRAS	54-56	35	7	1	3	—	8-10
BENGAL	63-65	10	17	3	—	27	6-8

<sup>3</sup> The right to vote is given in Madras to those whose income-tax is assessed on a total income of not less than Rs 7,500, to holders of estates with an annual

The Council is a permanent body not subject to dissolution, one-third of its members retiring once every three years.

The Legislative Assembly of every province is fully, and directly, elected. Its size varies from 50 in the North-West Frontier province to 250 in Bengal. Members are elected from communal constituencies and from different interests,<sup>1</sup> such as commerce, industry, landholders, universities and labour. The franchise for the Assembly is, like the franchise for the Council, essentially based on a property qualification, but the property qualification required is much lower.<sup>2</sup> There is also an alternative educational qualification. Somewhat lower qualifications are prescribed for women, in order to secure an electorate of women that will be at least 20% that of men. There is also a residence qualification for voters, in Madras of 120 days in the previous financial year. The Assembly, unless sooner dissolved, continues for five years.

The powers of provincial Legislatures may be described under the same four headings as those of the federal Legislature.

(i) *Legislative*. The Legislature has power to make laws for the province on matters enumerated in the provincial legislative and the concurrent lists, subject to certain limitations. (a) The provincial law is void to the extent of repugnancy to a federal law within the sphere of the Federation; (b) being a non-sovereign Legislature, it has no power to make any law affecting the power of Parliament to legislate for British India, or affecting the sovereignty, dominion or suzerainty of the Crown; (c) its power to pass laws of a discriminatory kind against British subjects domiciled in the United Kingdom, as, for example, in respect of travel and residence in India, the acquisition of property, and trade, is severely restricted;<sup>3</sup> (d) the previous sanc-

income of not less than Rs 1,500, pensioners drawing a pension of not less than Rs 250 per month, and people with more or less similar economic status

<sup>1</sup> The total of 215 seats in the Madras Assembly is distributed as follows — *General* 146, of which 30 are reserved for scheduled castes, Backward areas and tribes 1, Muslim 28, Anglo-Indian 2, European 3, Indian Christian 8, Commerce, Industry, Mining, and Planting 6, Landholders 6, University 1, Labour 6. *Women* General 6, Muslim 1, Indian Christian 1 *Total* 215

<sup>2</sup> Thus in Madras, a person is qualified to be included in the electoral roll for any territorial constituency if he has paid tax under the Madras Motor Vehicles Taxation Act, 1931, paid local rates, was assessed for income-tax, or occupied as sole tenant, throughout a year, a house in respect of which property tax or house tax had been paid

<sup>3</sup> Laid down in the Act, Part V, ch III.

tion of the Governor-General in his discretion is necessary for the introduction into the Legislature of certain classes of bills,<sup>1</sup> (e) the previous sanction of the Governor is required for the introduction of bills or amendments affecting any Governor's Act or ordinance promulgated by him in his discretion, or any Act relating to any police force, (f) a bill passed by it may be vetoed by the Governor in his discretion, or returned for reconsideration, or reserved by him for the consideration of the Governor-General, (g) a bill passed by it and assented to by the Governor (and by the Governor-General where a bill has been reserved by the Governor for his assent) may be disallowed by His Majesty, (h) without its consent, the Governor may enact legislation of a temporary character by ordinances, and of a permanent character by Governor's Acts, the latter for the purpose of enabling him to discharge his functions in so far as he is required to act in his discretion or to exercise his individual judgement<sup>2</sup>

(ii) *Financial* The consent of the Legislature is necessary for the raising<sup>3</sup> of the revenues of the province, and that of the Assembly for the spending of the money, subject to three limitations (a) Financial bills passed by it may be returned by the Governor for reconsideration, vetoed by him, or reserved for the consideration of the Governor-General who may veto them; or they may be disallowed by His Majesty; (b) some items of expenditure are charged upon the revenues of the province and are not votable, viz the Governor's salary, debt charges, charges for salaries of ministers, the Advocate-General and judges; expenditure necessary to meet judgements or awards of courts and any other expenditure declared by the Act or any Act of the provincial Legislature to be so charged; (c) the Governor has power to include in the schedule of authorized expenditure a sum necessary to secure the due discharge of his special responsibilities, subject to the condition that it may be exercised only after a demand has been made and the Legislature has either refused it or has assented subject to reduction.

(iii) *Ventilative*. The Legislature may give expression to the felt needs and grievances of the people by resolutions and motions for adjournment for the purpose of discussing definite matters of urgent public importance.

<sup>1</sup> See below, §7 of this chapter

<sup>2</sup> See §90 of the Act

<sup>3</sup> Land revenue does not require legislation

(iv) *Executive.* Through questions, resolutions and debates the Legislature can criticize ministers and virtually control their tenure through its power to refuse supply, and by passing motions of no confidence

### *Relations between the chambers*

Where the Legislature consists of two chambers, a bill requires the consent of both chambers before it can be presented to the Governor for his assent. If a bill passed by the Legislative Assembly is not passed by the Legislative Council, before the expiration of twelve months from its reception by the Council, the Governor may summon the chambers to meet in a joint sitting to consider and vote on the bill. He may convene a joint sitting before the period of twelve months is over, if it appears to him that the bill relates to finance or affects the discharge of any of his special responsibilities. The vote of the majority of members present at a joint sitting decides the issue.

Demands for grants are submitted only to the vote of the Legislative Assembly, the Legislative Council's consent not being required for them.

### *The Judiciary*

The organization of the Judiciary varies to some extent from province to province, its general structure may be illustrated from Madras.

(i) The lowest judicial authority—the village munsiff or the village panchayat court—has jurisdiction over a village or group of villages. It can deal with petty cases, whether civil or criminal, that is, civil suits where the value of the claim does not exceed Rs 50 (or, with the consent of the parties, Rs 200), and criminal cases in which the punishment may be a small fine or confinement in the village office for a few hours.

At this stage there is a bifurcation of civil from criminal jurisdiction.

(a) Civil cases are tried by district munsiffs and subordinate judges. The former are appointed by the Governor from a list of persons selected by the provincial Public Service Commission and exercise ordinary jurisdiction up to Rs 3,000. The latter are appointed by promotion by the High Court. They exercise jurisdiction in all original suits and proceedings of a civil nature and may be vested with appellate jurisdiction by

the High Court with the previous sanction of the provincial Government

(b) Criminal cases (not of sufficient importance to be tried by the sub-divisional magistrate) are tried by the sub-magistrates, appointed (one for each taluk)<sup>1</sup> by the provincial Government (usually from the revenue staff of the district) on the recommendation of the collector of the district and subject to his administrative control. More serious cases are tried by the sub-divisional magistrates,<sup>2</sup> who also hear appeals from the sub-magistrates who are under their administrative control. Above the sub-divisional magistrate is the district magistrate (who is also the collector of the district). He exercises supervision over all magistrates in the district, but does not himself find time to try cases, though invested with magisterial powers.

(ii) The District and Sessions Judge, besides exercising appellate jurisdiction over the civil judges of the district on the one hand and over the magistrates on the other, enjoys considerable original jurisdiction in the district, both criminal and civil. He is appointed by the Governor in his individual judgement; in consultation with the High Court.

(iii) The High Court is the highest court of civil as well as of criminal jurisdiction, with appellate or revisional jurisdiction and powers of supervision over all judicial authorities in the province. In most cases it is the final court of appeal. Judges of the High Court are appointed by His Majesty and hold office until they attain sixty years, but may be removed earlier in the same manner as judges of the federal Court. Until otherwise provided by an Act of the provincial Legislature, no High Court can have any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in its collection.

(iv) Appeals may, however, be carried from the High Court (a) to the federal Court if the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder and (b) to the Judicial Committee of the Privy Council in other civil and criminal cases, subject

<sup>1</sup> A taluk is a division of a district. A deputy tahsildar where such an officer exists, also exercises the powers of a sub-magistrate and tries within his jurisdiction the cases which would otherwise have been disposed of by the sub-magistrate at the taluk headquarters.

<sup>2</sup> There are three or more for each district.



to conditions laid down in the Charters of High Courts and in the Code of Civil Procedure.<sup>1</sup>

## §7 THE FEDERATION AND THE PROVINCES

The most striking change in the position of the provinces in relation to the Centre, as compared with the position under the Act of 1919, is that they have what is known as provincial autonomy, i.e. a sphere of action, legislative and administrative, in which they are, broadly speaking, free from the control of the Central Government. This autonomy, indeed, is not complete (as is indicated below), but as compared with the previous regime the change is a marked one and ought to be welcomed. The provincial subjects are enumerated in the Act; and the provinces are normally free to pass laws in respect of them and to enforce them much as they like. The existence of a federal Court with power to interpret the constitution is an important safeguard against the encroachment of the Centre on the provinces. Further, in the earlier constitution, the Central Government had considerable powers of superintendence, direction and control over the provinces; the powers of the federal Government and of the Governor-General in relation to the provinces are in normal times much less now, as indicated in the next paragraph.

The more important of the limitations on provincial autonomy are the following: (a) The federal Legislature may pass laws in respect of provincial subjects in an emergency, subject to the previous sanction of the Governor-General. (b) The previous sanction of the Governor-General is necessary for the introduction into provincial Legislatures of any bill or amendment which affects any Act of Parliament extending to British India, any Governor-General's Act or Ordinance issued by him in his discretion, any matter in which the Governor-General is required to act in his discretion or to exercise his individual judgement, or the procedure for criminal cases in which European British subjects are concerned. (c) The Governor-General may veto the laws reserved by the Governor for his assent.

<sup>1</sup> In the main, it may be said, an appeal lies (a) in civil cases if the amount or value of the subject-matter in dispute is substantial or the case involves some substantial question of law, or is otherwise certified by the High Court to be a case fit for appeal, (b) in criminal cases, if the High Court certifies that the case is a fit one for appeal. See also above, §5

(d) The Governor, in so far as he acts in his individual judgment or in his discretion, is under the control of the Governor-General acting in his discretion (e) The executive authority of a province must be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the federal Government may issue such directions to a province as may appear necessary to them for that purpose The executive authority of the Federation also extends to giving directions to a province in respect of the construction and means of communication of military importance. If a provincial Government declines to carry out the directions received from the federal Government, a means of compulsion is provided, for the Governor-General in his discretion may issue such instructions to the Governor as he thinks necessary to secure the object in view (f) The Governor-General is authorized in his discretion to issue instructions to a Governor regarding the manner in which the executive authority in his province is to be exercised for preventing any grave menace to the peace and tranquillity of India

## §8 THE INDIAN STATES

There are at present some 600<sup>1</sup> Indian states They vary considerably in area, population, and revenue<sup>2</sup> They agree, however in three respects They are not British territory; their subjects are not British subjects, in general, they are under a system of personal rule, the supreme power in each state being vested in a monarch Many progressive states—Mysore, Cochin and Travancore among them—have all the essentials of a developed system of administration a distinction between the privy purse and the state revenues, an independent Judiciary, and a regular graded list of civil officials recruited on merit and serv-

<sup>1</sup> The exact number of states is given as 562 in the *Report of the Indian States Committee* (1928-9), as 601 in the *Memoranda on Indian States*, 1940, and as 584, in *Atlas of India*, Oxford Pamphlets on Indian Affairs, No 16

<sup>2</sup> For example

	Area in sq miles	Population	Average annual revenue to nearest thousand
HYDERABAD	82,698	16,184,000	Rs 8,69,97,000
JUNAPADAR	0,31	224	Rs 1,000

ing till a fixed retiring age. Some of them have gone further and followed a policy of associating their people with the government. Nearly forty states have Legislative Councils with power to pass resolutions and laws, and to ask questions, though in nearly every case the Executive is vested with power to override the wishes of the Councils. A few have gone further, and introduced partial responsibility of the Executive to the Legislature, in Cochin and Rajkot, through a system of dyarchy; in Mysore, by including two members of the Legislature in the Council of Ministers which works on the principle of joint responsibility.

### *Paramountcy*

The British Crown as Paramount Power has certain rights and obligations in relation to the states. These rights and obligations are generally summed up in the term 'paramountcy'. Paramountcy is based upon the treaties, engagements, and sanads which the Paramount Power has at various times entered into with the states, supplemented by usage and by decisions of the Political Department of the Government of India on matters pertaining to the states. The activities of the Paramount Power may be enumerated under three heads<sup>1</sup>

(i) *External affairs* The states have surrendered the exercise of all their rights of external sovereignty to the Crown. They have no international life. They cannot make peace or war or negotiate or communicate with foreign States. They cannot cede, sell, exchange or part with their territories to other states without the approval of the Paramount Power, nor without that approval can they settle interstate disputes.

This statement of the position, it ought to be explained, does not mean that 'treaties with foreign (non-Indian) States concluded by the British Crown are *proprio vigore* binding on the Indian states without their concurrence'.<sup>2</sup> They become binding on the states only if they have been concluded with the previous consent or express authority of the states themselves. This position was accepted by the Government of India when the issue was raised<sup>3</sup> in connexion with the Geneva Dangerous Drugs Convention and Opium Agreement of 1925.

<sup>1</sup> See the *Report of the Indian States Committee, 1928-9*

<sup>2</sup> D. K. Sen, *The Indian States, their Status, Rights and Obligations*, pp. 118-19.

<sup>3</sup> *ibid.*

'To attempt to enforce any policy of suppressing or restricting the cultivation of opium in Indian states apart from any arrangement which may be entered into under Treaty obligations would mean interference in their internal administration such as the Government of India have no power to exercise either by prescriptive or by Treaty rights' <sup>1</sup>

(ii) *Defence and protection* The Paramount Power is responsible for the defence of the Indian states and has the final voice in all matters connected with defence, including establishments, war material, communications, etc. It defends them both against external and internal enemies

(iii) *Internal affairs* The succession of a ruler is not valid without the recognition of the Paramount Power, that Power has the right to settle disputed successions and to secure religious toleration. Further, it has rights in regard to railways, posts and telegraphs. It has the right to prevent gross misrule. In regard to constitutional reforms in the states, it is clear, according to authoritative statements made in Parliament, <sup>2</sup> that while the Paramount Power will not obstruct proposals for constitutional advance initiated by the Rulers it has also 'no intention of bringing any form of pressure to bear upon them to initiate constitutional changes'

The Indian States Committee said that it was impossible to define paramountcy 'Paramountcy must remain paramount', they said, 'it must fulfil its obligations, defining or adapting itself according to the shifting necessities of the time and the progressive development of the states' <sup>3</sup>

Are the states sovereign? The answer is that they do not have external sovereignty while they have varying degrees of internal sovereignty. A letter <sup>4</sup> from Lord Reading, as Viceroy, to the Nizam of Hyderabad sums up the position adopted by the Paramount Power, though only grudgingly accepted by the states

'The sovereignty of the British Crown is supreme in India, and, therefore, no ruler of an Indian state can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based only upon the Treaties and Engage-

<sup>1</sup> Memorandum of the Government of India to the League of Nations Opium Advisory Committee, quoted by Sen, op cit., p. 119

<sup>2</sup> 21 February 1938, 6 April 1939, 16 December 1939

<sup>3</sup> Report (1929)

<sup>4</sup> 27 March 1926. See Appendix to the Report of the Indian States Committee, 1928-9

ments but exists independently of them, and quite apart from its prerogative in matters relating to foreign powers and policies, it is the right and duty of the British Government, while scrupulously respecting all Treaties and Engagements with the Indian states, to preserve peace and good order throughout India. . . .

Where imperial interests are concerned or the general welfare of the people of a state is seriously and grievously affected by the action of its Government, it is with the Paramount Power that the ultimate responsibility for taking remedial action, if necessary, must lie. The varying degrees of internal sovereignty which the rulers enjoy are all subject to the due exercise by the Paramount Power of this responsibility.'

### *Position in the Federation*

The position of the federated state—the state which enters the Federation under the Act of 1935 when established—has been dealt with piecemeal elsewhere.<sup>1</sup> We now bring together the main points, adding a few details.

It enters the Federation voluntarily by its ruler executing an Instrument of Accession in which he specifies the list of subjects which he surrenders to federal authority, as well as the limitations which he desires to impose upon that authority.

It is expected<sup>2</sup> that the Ruler will normally be willing to accept items 1 to 48 of the Federal Legislative List (which has a total of 59). Exceptions and reservations are possible on account of existing treaty rights, or because the state has long enjoyed special privileges (as, for example, Travancore in connexion with postal arrangements and coinage). *The Report of the Joint Committee* suggested that the list of subjects accepted as federal by rulers willing to accède to the Federation ought to differ from one another as little as possible, and that a ruler who desired in his own case to except, or to reserve, subjects which appear in the federal list ought to be invited to justify the exception or reservation before his accession is accepted by the Crown.<sup>3</sup> The extent of federal power may be enlarged, but not diminished, by a supplementary instrument duly accepted. The instrument must also provide that a number of matters<sup>4</sup> may,

<sup>1</sup> See above, §§4, 5 and 6

<sup>2</sup> *Report of the Joint Committee on Indian Constitutional Reform* (Session 1933-4), Vol. I, Part I, p. 87.

<sup>3</sup> *ibid*

<sup>4</sup> Specified in the Second Schedule to the Act

without affecting the accession of the state, be amended by or under the authority of Parliament; but no such amendment, unless accepted by the ruler in a subsequent instrument, may extend the functions exercisable by the Federation in relation to the state. By executing the Instrument, the ruler also assumes the obligation of ensuring that due effect is given within his state to the provisions of the Act so far as they are applicable therein by virtue of it

The extent of legislative power that the Federation can exercise in relation to the state is strictly limited by its Instrument of Accession. It will be remembered that the federal Legislature is one in which the state is allotted representation individually, or jointly in the case of the smaller states, the representative (or representatives) being nominated by the ruler. Further, it has the concurrent power of being allowed to pass laws in respect of matters ceded to it by the Federation, so long as they do not conflict with the federal law which extends to it. The residuary power is, of course, with itself

A federation implies, as distinguished from a confederation,<sup>1</sup> that the Federal Government has powers to carry out federal laws through its own officers. This power, however, is restricted in India, in respect of the states. For an arrangement may be made with a state, and must be made if its Instrument of Accession so stipulates, whereby the ruler administers federal laws in his state. In such a case the Governor-General must be empowered to satisfy himself by inspection or otherwise, that the administration is carried out in accordance with the policy of the Federal Government, and to give directions to the ruler if he is not satisfied with such administration. It is laid down that, generally, the executive authority of the state must be exercised so as not to impede or prejudice the exercise of federal authority under any law which applies to it. If the Governor-General is not satisfied with the executive action of the state in this regard, he may, after considering any representations made to him by the ruler, issue any directions he thinks fit. It must be added that the federal Executive is also in fairness enjoined, in the exercise of its authority, to pay due regard to the interests of the state.

<sup>1</sup> See below, ch XXIV, §2

By entering the Federation, the state also submits itself to the jurisdiction of the federal Court as follows.

(i) *Original*. Disputes to which the state is a party and which concern the interpretation of the Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation, are cognizable by virtue of its Instrument of Accession<sup>1</sup> by the federal Court

(ii) *Appellate* Appeals from state High Courts may be brought to the federal Court on a question of the interpretation of the Act or Order in Council made thereunder or the extent of the legislative or executive authority of the Federation. Such appeals shall be by way either of special cases stated for the opinion of the federal Court by the state High Courts or cases required to be stated by the federal Court<sup>2</sup>

The powers and functions of the Paramount Power will be transferred to the federal authorities in respect of the subjects ceded by the state to the Federation, in respect of other subjects they will continue to be exercised by His Majesty's Crown Representative. The larger the number of subjects ceded by the state to the Federation, the less is it subject to the authority of the Paramount Power

Finally, it is necessary to stress the advantages which the states secure by joining the Federation. The primary gain is that, through their representation in the federal Legislature and the federal Executive, they secure a substantial voice in determining all-India matters (such as tariffs and defence) which affect their people and which at present are determined by the Government of India. Besides, they may even influence matters which concern British India only, for their representatives can take part in discussions on those matters (though not perhaps in the voting thereon<sup>3</sup>) in which the states have not ceded their powers to the Federation. A federal India also means a united India, and to the extent that the unity of the whole country contributes to the increased prosperity of every member of it, the states-members will be able to enjoy the benefits of that additional prosperity.

<sup>1</sup> And other disputes of a similar nature. See section 204.

<sup>2</sup> Section 207.

<sup>3</sup> *Report of the Joint Committee on Indian Constitutional Reform* (Session 1933-4), Vol. I, Part I, para. 217.

## §9 AMENDMENT OF THE CONSTITUTION

The constitution of India is a rigid one amendments to it cannot be made by the law-making bodies in India which pass ordinary laws

The constituent power is with the king in Parliament in Britain and, in a few specified matters, with His Majesty in Council

The most important of the matters which His Majesty in Council may decide are (i) the size and composition of the chambers of the federal Legislature and the methods of choosing and qualifications of members of that Legislature (subject to certain restrictions, such as that the amendment cannot vary the number of seats allocated to British India and the Indian states); (ii) the size and composition of the chambers of provincial Legislatures and the method of choosing and qualifications of their members, (iii) the substitution of literacy in the place of any higher educational qualifications prescribed as a qualification for women to vote, (iv) generally, the qualifications entitling persons to be registered as voters for the purpose of elections

Before His Majesty in Council can make such amendments one of two conditions is necessary Either (i) the federal Legislature or any provincial Legislature must pass a resolution in favour of such amendment and present to the Governor-General or, as the case may be, to the Governor, 'an address'<sup>1</sup> for submission to His Majesty praying that His Majesty may be pleased to communicate the resolution to Parliament The Governor-General or the Governor is required, when forwarding such a resolution and address to the Secretary of State, to communicate to him a statement of his views upon the proposed amendment The Secretary of State is required, within six months after the resolution and address are so communicated, to place before Parliament a statement of any action which it may be proposed to take on them Or (ii), in case no address is presented, the Secretary of State is required to take such steps as His Majesty may direct for ascertaining the views of the Governments, Legislatures and the minorities in India affected by such amendment

<sup>1</sup> An address of the kind indicated may be presented (with exceptions) only ten years from the inauguration of the Federation in the case of a resolution of the federal Legislature and ten years from the inauguration of provincial autonomy in the case of a resolution of a provincial Legislature



It is further laid down that certain specified<sup>1</sup> provisions of the Act dealing with the representation of the states are not to be amended without the consent of the ruler affected.

### §10 SOME GENERAL ASPECTS

At the end of a survey of the new Indian constitution, two questions arise. To what extent does that constitution transfer real power to the people of the country to govern themselves? In what respects is the Federation, which it provides for, different from federations known to history?

(i) *Transfer of power* To the first question, the answer is that in the provincial field there has been some real transfer of power, but there is much less in the Centre. The substantial degree of autonomy in the provinces and the transfer of all departments of government to popular ministers are steps in the direction of real self-government; the extension of the vote to a larger proportion of the electorate prevents that self-government from becoming a government by a small oligarchy. It is true that, according to the letter of the constitution, the power of elected Legislatures and popular ministers is much fettered, especially by the right of the superior services to appeal to higher authorities against the decision of ministers and by the vast powers vested in the Governor, who, when he acts in his discretion or in his individual judgement, is under the control of the Governor-General. The working of the constitution from 1937 to 1939 is, however, conclusive proof of the fact that, given organized political parties,<sup>2</sup> the people are in a position to enjoy the substance of self-government in the provincial sphere.

But it is difficult to speak of the Central Government in the same terms. The reservation of important departments of government (like defence and foreign affairs) for administration by the Governor-General with the aid of Counsellors, inevitable in the circumstances, removes a vital sphere of national affairs from

<sup>1</sup> Part II of the first schedule of the Act

<sup>2</sup> But where the ministry does not command the support of a large and stable majority in the Legislature, it must be emphasized, there is every chance that a Governor will be able to have his own way. The recent history of Bengal is revealing in this connexion, there is ample evidence to show that the Governor acted in many vital matters in disregard of the wishes of ministers and depended on the advice of a section of permanent officials. See the Chief Minister's letter to the Governor of Bengal dated 2 August 1942 (*The Hindu* 7-7-1943) and Dr Shyama Prasad Mookerjee's statement (*The Hindu*, 24-11-1942)

popular control. The constitution of the federal Legislature, composed as it is of representatives of communities and interests, partly nominated and partly elected (the lower House indirectly elected), is anything but desirable, as it practically prevents the formation of political parties and the formation of a government based broadly on popular consent. The wide powers and special responsibilities of the Governor-General may, it is feared, be used to prevent the development of responsible government. There is widespread suspicion, based on the reading of history, that these powers and responsibilities (in particular those relating to the prevention of commercial discrimination, maintenance of financial stability and the constitution of the Reserve Bank and the railway authority) will be used to thwart Indian ministers in their legitimate desire to develop Indian industry, commerce and shipping. That great authority, Berriedale Keith, has said that it is difficult to feel any satisfaction with the federal scheme

‘Whether a federation built on incoherent lines can operate successfully is wholly conjectural. If it does, it will probably be due to the *virtual disappearance of responsibility* and the assertion of the controlling power of the Governor-General backed by the conservative elements of the states and of British India.’<sup>1</sup>

It is not surprising that the federal scheme has met with practically unanimous disapproval in India and that steps are being taken to revise a scheme which has not even been put into operation.

(ii) *Novel features* In answer to the second question, it is sufficient to say that the Indian Federation is unlike any other federation known to history. Many of its novel features are explained by the fact that its constituent units, the Indian states and the British Indian provinces, are of two distinct types: the former, broadly speaking, autonomous and under a system of personal rule, the latter, not autonomous, being parts of a unitary state and under partially democratic and responsible government.

The most important of the novel features are (a) that the units become members of the Federation by two different processes, some joining it voluntarily, others being made members of it by Act of Parliament; (b) Generally in a federation, the Federal Government has identical legislative, administrative, and

<sup>1</sup> Keith, *A Constitutional History of India, 1600-1935*, pp. 474-5. Italics ours.

financial powers in relation to the units. But in the Indian Federation, its relations to the units differ not only as between the Indian states and the provinces, but also as between one federated state and another.<sup>1</sup> (c) Again, in the structure of the Federal Government there are many novel features. The distribution of seats in the Legislature among the component units does not correspond to the principles followed in typical federations, viz. equality of representation in the upper House and representation on a population basis in the lower House. Further, the allocation among some 600 states of 104 and 125 seats in the upper and lower Houses respectively necessitates, in certain cases, representation by *groups* of states. The members from one type of unit are nominated, those from another, elected, representatives of the states in the federal Legislature may take part in the proceedings relating to all federal subjects, though a number of federal laws may not apply to them. (d) And finally, in federations known to history (barring perhaps Canada), the component units as well as the Centre are normally given a share in the amendment of the constitution so that they may have a sense of security in respect of the powers allotted to them.<sup>2</sup> In India, the states apart, neither the units nor the Centre has a voice in regard to amendments, except within a very limited range.

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<sup>1</sup> See above, §4

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# BOOK III. ORGANIZATION OF GOVERNMENT

## CHAPTER XXIII

### THE CLASSIFICATION OF STATES

#### §1 INTRODUCTORY

In our analysis of the subject-matter of Politics <sup>1</sup> we indicated that from a study of governments in the past and in the present, we should be in a position to formulate, by an inductive process, principles regarding the organization of government, its structure and working. To this we now turn.

There is, however, one preliminary inquiry to make. There are, as our survey has shown, different types of States. A discussion of principles relating to the organization of government, to be realistic, must needs take into account the similarities and differences between States, these are best studied by a classification of States <sup>2</sup>

#### §2 EARLY CLASSIFICATIONS

Aristotle was among the earliest thinkers to attempt a comprehensive classification. The basis of his classification is at once quantitative and qualitative. He takes into account the *number* of those in whom sovereign power is vested, and the *end* to which the conduct of government is directed. The supreme power in a State must necessarily be in the hands of one person, or of a few, or of many. The one, or the few, or the many may

<sup>1</sup> See above, p. 4

<sup>2</sup> Some writers like Gilchrist (*Principles of Political Science*, p. 231) prefer the term 'the classification of the forms of government' on the ground that the 'form of States' is really the form of government. Willoughby (*The Nature of the State*, ch. XIII) goes so far as to say that there can be no such thing as a classification of States. 'In essence they are all alike—each and all being distinguished by the same sovereign attributes.' With Leacock (*Elements of Political Science*, p. 109), we may say that this objection does not seem very strong. 'The differences in structure of government constitute the basis of classification, but we may on that basis either speak of the various "forms of government" or "forms of the State".' When we consider the fact that modern States differ not only in their forms of government, but in their professed *end* (e.g. totalitarian States v. democratic States) and in their very *nature* (e.g. unitary v. federal), the term 'the classification of States' seems even preferable; it has, besides, the support of writers like Hobbes and Locke, and, in recent times, Bluntschli and Marriott.

govern the community for the common good or for their own selfish or class interests. The first type of constitution is a *normal* one, the second, a *perverted* one. Taking these two principles together, Aristotle arrived at the conclusion that six kinds of States are possible: monarchy and its perversion, tyranny, aristocracy and its perversion, oligarchy, polity and its perversion, democracy.

Two observations are necessary to help us to understand Aristotle's account correctly. First, he used the term 'polity' to describe the unselfish rule of the masses; 'democracy' was for him a perversion. To us, the former is a somewhat unfamiliar term, and the latter does not necessarily indicate the arbitrary or selfish rule of the demos. Aristotle's dislike of 'democracy' must be explained by the degeneration of Greek democracies in his day. Second, in his definition of oligarchy and of democracy Aristotle was not entirely logical. He defined oligarchy as the rule of the rich in the interests of the rich, be they few or many; and democracy, as the rule of the poor, be they many or few, in the interests of the poor.<sup>1</sup> On his own first principles, a constitution in which the rich ruling in the interests of the rich are in a majority should have been called a democracy, and one in which the poor ruling in the interests of the poor are in a minority, an oligarchy. Aristotle was aware of this illogicality, but after a thorough discussion,<sup>2</sup> he decided that the question of numbers was accidental, that of wealth, essential. To keep to the facts of life is more important than to attempt a meaningless logical precision; Aristotle knew that normally 'there were many poor and few rich'.

A few of the later classifications—by Polybius, Hobbes, Locke, Montesquieu, and Rousseau—will also be briefly referred to. In all of them the influence of Aristotle may be traced.

Like Aristotle, Polybius adopted, in addition, an ethical standard when marking off one State from another. 'The rule of one may be held to be a kingship only when his rule "is accepted voluntarily and is directed by an appeal to reason rather than to fear and force". Otherwise it is a *despotism*. Nor can every oligarchy be properly described as an aristocracy, but only where "the power is wielded by the justest and wisest men selected on their merits". Similarly the rule of the many may

<sup>1</sup> *Politics*, bk IV, ch IV

<sup>2</sup> *ibid*

easily become nothing but *mob-rule*; the honourable designation of a democracy must be reserved for a government where "reverence to the gods, succour of parents, respect to elders, obedience to laws are traditional and habitual" ' ' <sup>1</sup>

Hobbes is content with a threefold classification, basing it entirely on the location of sovereign power in the one, the few, or the many, and paying no heed to the ethical *differentiae* noted by Aristotle and Polybius

'The difference of Common-wealths consisteth in the difference of the Sovereign, or the Person representative of all and every one of the Multitude . . . . When the Representative is one man, then is the Common-wealth a MONARCHY when an Assembly of All that will come together, then it is a DEMOCRACY, or Popular Common-wealth when an Assembly of a Part onely, then it is called an ARISTOCRACY Other kind of Common-wealth there can be none for either One, or More, or All, must have the Sovereign Power (which I have shewn to be indivisible) entire' <sup>2</sup>

Hobbes was aware of other names of government such as Tyranny, Oligarchy and Anarchy, but he refused to consider them as other *forms* of government Those who were discontented under Monarchy called it Tyranny, those who were displeased with Aristocracy called it Oligarchy, and those who nursed grievances against Democracy called it Anarchy.

Locke substantially follows Hobbes in his classification, with some differences of detail Thus he says, 'according as the power of making laws is placed, such is the form of the common-wealth'.<sup>3</sup> If the majority, in whom the whole power of the community is placed at the dawn of civil society, retain the legislative power in their own hands and execute those laws by officers of their own appointing, the form of the government is a perfect democracy, if they put the power of making laws into the hands of a few select men and their heirs or successors, then it is an oligarchy, or if into the hands of one man, then it is a monarchy, hereditary or elective.

Montesquieu (1699-1785), the French political philosopher, held that States are of three types, the republican, the monarchic and the despotic If all or part of the people have the sovereign

<sup>1</sup> Polybius, cited by Marriott in *The Mechanism of the Modern State*, Vol I, p. 26.

<sup>2</sup> Hobbes, *Leviathan*, pp 96-7

<sup>3</sup> *Of Civil Government*, bk II, ch X

power, the State is a republic, a democratic or an aristocratic one. A monarchy is the rule of a single person according to law, a despotism, the rule of a single person arbitrarily. Montesquieu indicates the various principles animating the various forms of government, the sustaining and driving power behind them. Thus the virtue of the citizens is the principle of a republic. In a democracy, this virtue takes the shape of love of country and desire for equality. That the members of a ruling class will be moderate towards the people, maintain equality among themselves, and enforce the laws against persons of rank—this is the virtue of an aristocracy. The mainspring of monarchy is honour: the confidence or conceit of the individual and of the governing classes concerning their own special importance, a confidence which spurs men to accomplish things quite as much as virtue itself. Despotism requires neither virtue nor honour, but fear which suppresses both courage and ambition among subjects.

Rousseau, like Hobbes, is content with a numerical *differentia*, governments are monarchies, aristocracies or democracies.

### *Their inapplicability to modern conditions*

Whatever was the value of these classifications at the time when they were formulated, it should be clear to the student of modern constitutions that they are quite inapplicable to existing political conditions. They do not help one to understand the resemblances and differences between States, which is the object of a classification. To illustrate. Under the classification adopted by Aristotle, almost every State in the preceding survey should be termed a democracy (or a polity), we know, however, that there are marked differences between them. Britain is a unitary State, the USA, a federal one. The USA is a federal State with a non-parliamentary Executive, Australia is a federal State but with a parliamentary Executive. Switzerland is also federal but with an Executive which is at once both parliamentary and non-parliamentary. The inapplicability of older classifications is primarily due to the developments in political constitutionalism in recent times. The authors whom we have cited were classifying States with which they were familiar. But we have to frame a classification which is more in accordance with modern conditions.



§3 A CLASSIFICATION OF MODERN STATES

The classification outlined below is based upon the suggestions made by Bryce, Marriott, Strong and Lindsay. While it applies to most modern States, it does not claim to be applicable to all.

		BASIS OF DIVISION	A	B
I	1	The conception regarding the sphere of the State	Liberal <sup>1</sup>	Totalitarian <sup>1</sup> (a) communist (b) fascist
II		The nature of the political organization		
	2	The nature of the State	Unitary <sup>2</sup>	Federal <sup>2</sup>
	3	The nature of the constitution	Flexible <sup>3</sup>	Rigid <sup>3</sup>
	4	The nature of the electorate	(i) Adult suffrage <sup>4</sup> (ii) Single-member <sup>4</sup> constituency	(i) Restricted suffrage <sup>4</sup> (ii) Multi-member constituency <sup>4</sup>
	5	The nature of the Legislature	Bicameral <sup>5a</sup> (a) elective or partially elective second chamber (b) non-elective second chamber	Unicameral <sup>5b</sup>
	6	The nature of the Executive	Parliamentary <sup>6</sup>	Non-parliamentary <sup>6</sup>
	7	The nature of the Judiciary	The rule of law <sup>7</sup>	Administrative law <sup>7</sup>

The terms used in the classification have been defined in Part I and in Part II, Book II. Three explanations may be added.

<sup>1</sup> See above, ch IX, §7

<sup>2</sup> See above, ch XVI, §1, and below, ch XXIV.

<sup>3</sup> See above, ch XVI, §2, and below, ch XXV

<sup>4</sup> See above, ch XVI, §8 Restricted suffrage indicates the restriction of the right to vote to men, as in France, or to men and women in possession of prescribed educational or property qualifications as in India

<sup>5a</sup> Consisting of two chambers.

<sup>5b</sup> Consisting of one chamber.

<sup>6</sup> See above, ch XVI, §9, and ch XVII, §3

<sup>7</sup> See above, ch XVI, §13, and ch XVII, §6

### §3] A CLASSIFICATION OF MODERN STATES

(i) The classification is framed on two major bases 'I. The conception regarding the sphere of the State', whether liberal or totalitarian. This *differentia* has assumed such importance in modern times that it deserves emphasis in any scheme of classification. The life of the people in liberal States has a quality all its own, different not only in degree but in kind from that of the people in totalitarian States. As has been indicated elsewhere, totalitarian States themselves fall into two types, the communist and the fascist, the former abolishing, and the latter retaining, private capital 'II. The nature of the political organization' Under this heading three *differentiae* are noteworthy, viz the nature of the State (unitary or federal), the nature of the constitution (flexible or rigid), and the structure of the Government (the electorate, the Legislature, the Executive and the Judiciary)

(ii) It cannot be assumed that a State which comes under A in respect of 1 comes under A also in respect of 2, 3, 4, 5, 6 and 7. Thus the U.S.A. is a Liberal State (1), but is not a unitary State (2), her constitution is not a flexible one (3), and her Executive is not a parliamentary one (6)

(iii) As we adopt in effect seven bases of classification, it is necessary to deal with each State seven times in order to place it properly. Thus.

BRITAIN Liberal, unitary State, flexible constitution, adult suffrage and single-member constituency, bicameral Legislature with a non-elective second chamber, parliamentary Executive, and the rule of law.

THE FRENCH REPUBLIC. Liberal, unitary State, rigid constitution, restricted suffrage and single-member constituency, bicameral Legislature with an elective second chamber, parliamentary Executive, and administrative law. And so on.

The rest of the book follows the order of the principles of classification laid down in the Table under 'II. The nature of political organization' A chapter on 'The Separation of Powers' has, however, been added before a consideration of the electorate, the Legislature, the Executive, and the Judiciary.

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## CHAPTER XXIV

# UNITARY AND FEDERAL STATES

### §1 UNITARY AND FEDERAL STATES

A unitary State may be defined as one organized under a single central government; and unitarianism, as the habitual exercise of supreme legislative authority by one central power.<sup>1</sup> Britain, France, Germany and Italy are unitary States. South Africa and India have some characteristics of the unitary State, but they have also some of the characteristics of the federal State

A federal State is one in which there is a central authority that represents the whole, and acts on behalf of the whole in external affairs and in such internal affairs as are held to be of common interest, and in which there are also provincial authorities with powers of legislation and administration within the sphere allotted to them by the constitution.<sup>2</sup> It is, in the words of Hamilton, 'an association of States that forms a new one'; or, as Dicey put it, it is a political contrivance intended to reconcile national unity with the maintenance of state rights. The USA, Canada, Australia, Switzerland and the USSR are federal States

The distinctive feature of federation is the formal division of governmental powers by a constitution between the constituent units (states, provinces, or cantons) and the larger State which they compose. The units have power to pass laws on the subjects allotted to them and to administer and interpret them; and the Federal Authority has similar power on the subjects allotted to it. Both the units and the Federal Authority may exercise their legislative, administrative and judicial powers only within the limits set by the constitution. The supremacy of the constitution is, therefore, a second important feature of federation. The constitution of the USA, for instance, explicitly declares. 'This constitution and the laws of the USA which shall be made in pursuance thereof . . . shall be the supreme law of the

<sup>1</sup> See above, ch XVI, §1

<sup>2</sup> H. Samuel in *The Nineteenth Century*, No 428, p 676

land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' This supremacy implies that the laws passed by any authority in the State, if contrary to the constitution, may be declared *ultra vires*; some authority, such as a Supreme Court, to interpret the constitution and decide conflicts of jurisdiction between the Centre and the units is therefore essential. It also means that neither the Federal Authority, nor any unit thereof, has the power to change the constitution as it likes; for, then, one of the two, and not the constitution, becomes supreme. In other words, a federal State has necessarily a rigid constitution. Normally, the machinery to amend the constitution is one in which both the Federal Authority and the units have a definite place. The U S A, Australia and Switzerland are instances of this. These then are the essential features of federation: the division of powers, the supremacy of the constitution, the existence of a court to interpret the constitution, and the rigidity of the constitution.

By contrast, in a unitary State there is no constitutional division of powers between the Centre and local territorial divisions, at any rate it is one which the Centre is not powerless to alter. The distinguishing mark of a unitary State is that all local governing authorities within the State (provinces, counties, districts) are created, their powers defined, and their form of organization determined by the Central Government. That Central Government may be limited by a superior constitution in a number of ways without affecting the unitary character of the State; but if the constitution gives powers to the local bodies independent of, and not modifiable by, the Central Government, the political system partakes of the essential nature of federation. Therefore, it is by the nature of the relationship of the Centre to the local bodies that one determines whether a State is federal or unitary. Briefly, in the former, both the central and local authorities derive their power from a common source; in the latter the Central Government has authority legally to determine the powers, indeed the very existence, of the local authorities. It follows that in the unitary State, the constitution need not *necessarily* be supreme, for the Centre may have the power to modify it, as in Britain; there is no need to have an authority to decide conflicts of jurisdiction between the Centre

## §2 ]      *FEDERATION AND CONFEDERATION*

and the local authorities, and the constitution need not *necessarily* be rigid.

### §2      *FEDERATION AND CONFEDERATION*

A federation must be distinguished from a confederation. The League of Nations is an example of the latter. The American Confederation, whose articles were drawn up by the Continental Congress in 1777, and which lasted from 1781 to 1789, is another. Here each one of its thirteen State-members was a sovereign body-politic. The only form of common control was exercised through the Congress, 'a body of delegates which had no power to compel the States to its will, and no power to command or to tax the individual citizens of the thirteen States'. Congress was primarily to look after foreign relations, declare and conduct war, build and equip a navy, and issue requisitions upon the States for soldiers and for funds. The working of the system for eight years proved its inadequacy, for while Congress could pass resolutions 'it had no authority to make law, in the sense of regulations backed up with a power of enforcement'. The confederation gave place to a federation. The German Confederation, as it existed from 1815 to 1866, is a third example. This was a union of 39 States, including kingdoms, free cities, and principalities. The primary aim of the union was the external and internal security of the States. The common authority was the Central Assembly called the Diet, consisting of delegates of the Governments of the States. But no central Executive was established, each State acting as the executor of the resolutions of the union. In 1866 it had to be dissolved to give place (later, in 1871) to the Federation of the German Empire.

A confederation, like a federation, is a union of States with a common recognized authority in certain matters affecting the whole, and especially in respect of external relations. But it differs from a federation in that it is a league of sovereign States (*Staatenbund* is the expressive German term, *Staaten* being plural); whereas federation creates a new State (*Bundesstaat*, *Staat* being singular). In the former, sovereignty rests with the component States; in the latter, the component states give up their sovereignty in favour of the new State, sovereignty in the new State being exercised by the amending body of its constitu-

tion It follows that while the units of a confederation have the legal right of secession, the units of a federation have not. The distinction between the two forms of union is therefore fundamental, founded upon the source of ultimate authority, sovereignty.

Another difference between the two is that the common authority of a confederation deals only with the Governments of the constituent units, and not, as in a federation, directly with their individual citizens. The citizen in a confederation therefore has to obey only one Government, that of his own State; the orders of the common authority are binding on him only in so far as they are imposed on him by the Government of his own State. The citizen in a federal State, on the other hand, has to obey two Governments, that of his state and that of the Federal Authority.

From these two differences may be deduced a third—the confederation, being a looser union than the federation, is generally less stable.

### §3 CONDITIONS OF FEDERALISM

The normal method of establishing a federation has been the coming together of a number of States, formerly separate and sovereign, to establish a common government for better security. This was how the United States, Switzerland, and Australia came into existence. Sometimes it has been the other way round. In Canada, for instance, an originally unitary State was converted into a federal one by a constitution marking out the spheres of the provinces, and making each of them part of a federal State. This is a process of devolution or decentralization, designed to secure a more efficient government. The plan for the Indian federation provides for both processes, some of its units (the Indian states) being permitted to join it voluntarily, others (the provinces) being made members of it by a process of decentralization.

The conditions which favour the establishment and continuance of a federation are as follows

(1) *The desire for union.* Obviously unless some political units desire to unite and establish a common government for their common interests, there is no basis for federation. This desire normally arises when a number of small independent

States, locally adjacent, come to feel that if they do not unite, their independence will be threatened by more powerful States. It will not arise where the separate States are so powerful as to be able to rely, for protection against foreign encroachment, on their individual strength 'If they are,' said J S Mill, 'they will be apt to think that they do not gain, by union with others, the equivalent of what they sacrifice in their own liberty of action ; and consequently, whenever the policy of the (con)federation, in things reserved to its cognizance, is different from that which any one of its members would separately pursue, the internal and sectional breach will, through absence of sufficient anxiety to preserve the union, be in danger of going so far as to dissolve it' <sup>1</sup> The felt need for strength in external relations is invariably coupled with the desire of the separate States, by conjoint action, to develop foreign trade, remove internal trade barriers and prevent internecine warfare The thirteen American States, which joined to form the U S A , were eager not only to stabilize their hard-won independence of England, but also to adopt a uniform commercial policy, and generally to make the maximum use of the opportunities afforded by union to advance their general prosperity. The six colonies which federated to form the Commonwealth of Australia in 1900 'would not have done so except under the dread of danger from imperializing Powers in the Pacific, a danger not apparent until the closing years of the last century' <sup>2</sup> At the same time 'there was a general feeling that an authority with wider powers than any existing before the federation was necessary for industrial and social development, and that a supreme judicial authority ought to be established to avoid the expense and delay involved in carrying cases to the Privy Council in London' <sup>3</sup> These two instances also remind us that the sentiment of union is induced by community of blood, language and culture, and the similarity of political institutions These create and keep up common sympathy among the peoples concerned and conduce to an identity of political interest without which a federation cannot come into being, or if forcibly created, will not last long

(ii) *The desire for local independence* While there must be a desire for union, this desire should not be so great as to result

<sup>1</sup> *Representative Government*, ch XVII

<sup>2</sup> Strong, *Modern Political Constitutions*, pp 111-12

<sup>3</sup> *ibid*



in the demand for the establishment of a unitary State. A desire among the component states for the preservation of their independence in all but essentially common matters is a pre-condition for this form of political organization. Federalism is a natural constitution only for a body of States which desire union and do not desire unity.<sup>1</sup>

(iii) *Geographical contiguity.* The physical contiguity of countries which are to form a federation 'is certainly a favourable, and possibly a necessary, condition for the success of federal government'. If they are widely separated, the desire for union cannot easily emerge, as the advantages to be obtained do not appear real enough to make the necessary sacrifice worth while. The proposal for a federation of the countries which form part of the British Commonwealth, which found some support in the last century, fell through partly because these countries were physically wide apart.

(iv) *The absence of marked inequalities among the component units.* If there is any State so much more powerful than the rest as to be capable of vying in strength with many of them combined 'it will insist on being master of the joint deliberations: if there be two, they will be irresistible when they agree; and whenever they differ everything will be decided by a struggle for ascendancy between the rivals'.<sup>2</sup> The classic instance of this is the German Empire, established in 1871; the predominance of Prussia vitiated the federal principle.

(v) *Political education and legalism.* The permanence of a federation demands a capacity on the part of the people to appreciate the meaning of a double allegiance, and the ability to prevent the centrifugal principle of political action from overcoming the centripetal. It also means a developed sense of legalism, or in other words 'a general willingness to yield to the authority of the law courts' which decide indeed what the constitution at any moment is.

#### §4 PROBLEMS OF FEDERAL GOVERNMENT

The federal State, differing as it does from the unitary in essential features, has to face a number of problems which the latter has not. The most important of these are:

<sup>1</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, p. 602

<sup>2</sup> Mill, *op cit.*, ch. XVII.

#### §4] PROBLEMS OF FEDERAL GOVERNMENT

(i) *A satisfactory division of powers* The problem which all federal States have to solve is how to secure an efficient Central Government, while allowing scope for the diversities, and free play to the authorities, of the units. It is, to adopt Bryce's metaphor, to keep the centrifugal and centripetal forces in equilibrium, so that neither the planet states shall fly off into space, nor the sun of the Central Government draw them into its consuming fires. The general principle on which the division of powers should rest is fairly obvious 'Whatever concerns the nation as a whole should be placed under the control of the national Government. All matters which are not primarily of common interest should remain in the hands of the several states'<sup>1</sup> Such subjects as foreign affairs, defence, the control of the armed forces, foreign trade, maritime shipping and currency, are clearly of common interest and are everywhere federal, municipal institutions, hospitals, local public works, property and civil rights, and the administration of justice within the state, are clearly of a local nature and are everywhere allotted to the units. On a number of subjects, however, the common interest, or the purely local interest, is not quite so clear, and, therefore, the details of the division vary under different federal constitutions.

There is a variation not only in the particular subjects which fall within the sphere of the Centre and of the units, but also in the way in which the division is effected. Broadly speaking, our survey suggests, there are three such methods.

(a) In the U S A, Australia, Switzerland, Weimar Germany, and the U S S R, the powers of the Centre are enumerated in the constitution, the residue is left to the units. The enumeration itself is not of a uniform type, in the U S A there is one list of exclusively federal subjects allotted to the Centre, with some prohibitions both on the Centre and on the units, in Australia, Switzerland, and Weimar Germany, the Centre has power to pass laws on an exclusively federal list as well as on a concurrent list, Central laws in respect of concurrent subjects prevailing over those of the units, in the U S S R, there is only an exclusively federal list. The device of concurrent powers is specially noteworthy as it provides a plan by which the Centre can step in in some matters when the Government of a unit is

<sup>1</sup> Dicey, *op cit*, p 143

lazy and unprogressive and when the need for uniformity demands its interference, while leaving the initiative in the first instance to the units.

(b) In Canada, the powers of the provinces are enumerated; the residue is left to the Centre, though, as has been indicated in the section on Canada, this is qualified in some ways by the powers granted to the provinces in respect of matters of a 'merely local or private nature'.

(c) In the proposed Indian federation, the powers of the Centre and of the provinces are more or less exhaustively enumerated in three lists, the exclusively federal, the concurrent and the exclusively provincial; further, the residuary power as such is neither with the Centre nor with the provinces, but is to be allotted (as and when each specific case arises) to the Centre or to the provinces by the Governor-General in his discretion.

A word may be added about the 'enumerated' and the 'residuary' powers. The object of enumerating the powers of any authority is to limit it. Where, then, a federal constitution enumerates the powers of the Centre, as in the U.S.A., the object clearly is to limit its powers as against the units, and enable the latter to retain all the rest; conversely, where it enumerates the powers of the units, as in Canada, the object is to limit their powers as against the Centre. In general, therefore, it is true to say that the greater the 'reserve of powers' with the units, the more markedly federal is the State whose constitution permits such reserve to them<sup>1</sup>

But three things must be emphasized. (a) The 'more markedly federal' nature depends not on the mere fact that the residue is allotted to the units, but on the content of that residue; it would be absurd, for instance, to consider Weimar Germany markedly federal *because* the residue was left with the states. (b) The idea of the residuary powers has little significance, as in India, where care is taken to enumerate every conceivable power, so that very little is left as the 'reserve of powers'. (c) Under modern economic and social conditions, where an increasing number of problems can be met only by an authority representing the general interest, it seems the wisest policy (if it were possible) to enumerate the powers of the units and leave a large reserve of powers to the Centre.

<sup>1</sup> Strong, *op cit*, p. 101.

#### §4] PROBLEMS OF FEDERAL GOVERNMENT

The governmental powers must not only be satisfactorily distributed between the Centre and the units, but provision must be made to prevent either from encroaching upon a sphere allotted to the other. Here, again, federations differ in respect of the safeguards provided against this possibility, and their efficacy. The most common safeguard is the establishment of an independent court to interpret the constitution and decide conflicts of jurisdiction between the Centre and the units. The American and the Australian courts are the best instances of this, in Switzerland and in the U S S R the Supreme Court has no power to declare the federal law unconstitutional and, to that extent, the judicial safeguard is ineffective as a means of protecting the rights of the units. A second safeguard is the power given to the people, as in Switzerland, by the referendum and the initiative to decide finally on constitutional laws, the opinion of a majority of the people being, as it ought to be, final. Thirdly, the constitution is made rigid, i.e. not alterable, by the ordinary law-making body of the Centre or of the states. Invariably, too, some part is given both to the Centre and the units in the process of amending the constitution, the U S S R being an exception in that it ignores the units, again invariably, the part assigned to the units is greater than that allotted to the Centre. The central Legislature is given the power to *propose* amendments in the U S A, Australia, and Switzerland, the final *ratification* by a majority of the units is made essential (in the U S A by three-fourths of the states). Further, some fundamental rights of the units (as, for instance, the right to equal membership in the Senate in the U S A, and territorial limits in Australia) are made unalterable except with the consent of the states affected.

(ii) *Protection of the smaller units against dominance by the larger.* As the units in no federation are identical in size and population, it is possible that the larger units may have a predominant influence in legislation on account of their larger representation in the lower House of the central Legislature (everywhere constituted on the basis of population). Two provisions are generally adopted to prevent this evil (a) In the second chamber of the central Legislature, every unit is given equal representation (in the U S A, Australia, Switzerland, and the U S S R), or a provision is made, as in Weimar Germany, restricting the number of members that may be sent to the

second chamber by *any* unit to less than one half of its total strength. Further, in the first four States mentioned, the second chamber is given powers equal, or very nearly equal, to those of the first. The constitution of the U S A. goes further and gives the Senate two important powers denied to the House of Representatives, those of consenting or refusing its assent to appointments and treaties made by the President (b) It is stated (in Australia and Switzerland) that no amendments to the constitution may become valid until they have been ratified not only by a majority of the whole people, but also by a majority of the federal units. In the U S A. the consent of three-fourths of the states is necessary.

(iii) *Organization of the relation between the Centre and the units.* Ideally, in a federal State, the Centre and the units ought to be mutually independent in the spheres allotted to each by the constitution—in legislation, in administration, and in finance. This mutual independence is indeed the distinguishing principle of federalism, and it can be truly said that the greater the independence of the units from the Centre in their defined spheres, the more truly is the political system federal in character. In actual practice, this ideal condition rarely obtains. Various points of contact are established between the two, partly by law and partly by usage.

In our survey of federal States, several methods of federal control over the units sanctioned by the constitution have been noticed. the federal guarantee to every state in the U S A. of a republican form of government and of protection against invasion and, on the application of the state authorities, against domestic violence, the power of the Governor-General in Canada to veto provincial laws and to appoint the Governors of the provinces; the control of the Governor-General in the (proposed) Indian federation over the Governors whenever the latter act in their individual judgement or in their discretion, and the administration of many federal laws through the administrative machinery of the units in Switzerland and Weimar Germany, which, to this extent, is placed in a subordinate position in relation to the Federal Government. The last is particularly noteworthy. Experience shows that such administrative decentralization has at least two advantages: it makes the administration of federal laws more popular (being in the hands of local men)

#### §4] PROBLEMS OF FEDERAL GOVERNMENT

than it otherwise would be, and, secondly, by avoiding unnecessary duplication of the administrative machinery, it secures economy.

Of the instruments of federal control over the units established by usage, the most noteworthy is the system of grants-in-aid given by the Federal Government in the U S A. to the states in recent years. These grants are made for the development of agricultural and vocational education, for the construction of roads, for maternity and infancy aid and so on, and in 1930 entailed congressional appropriations of nearly \$135,000,000. The states are not bound to accept them, but once they accept them, they subject themselves in some degree to federal control over the activities for which the money is voted.

(iv) *Organization of the relation among the units* Each state is more or less independent not only of the Centre but of other states as well. Such provisions as are included in federal constitutions to regulate their relationship are calculated to secure harmony among them in respect of certain essential matters, and to prevent any two or more of them from conspiring against the interests of the whole. Thus every state is enjoined to give full faith and credit to the public acts, records and judicial proceedings of every other state, the citizens of every unit are declared to be entitled to the privileges and immunities of citizens of every other, it is required that all articles grown, produced or manufactured by any one of the units shall be admitted free into every other; all separate alliances and treaties of a political character between the units are forbidden, and so on.<sup>1</sup>

(v) *A satisfactory method of amendment.* The peculiar problems of federal States in regard to the amending body are that (a) neither the Centre nor the units by themselves should be given the power to alter the constitution, as such power is likely to affect one of the essential features of federalism, viz the supremacy of the constitution, and (b) it is desirable that in the body which is authorized to change the constitution, both the Centre and the units are given some place, and further the smaller states must be protected against dominance by the larger. How these problems are faced by the different federations has already been indicated in (i) and (ii) above.

<sup>1</sup> Article 118 of the constitution of Australia. Articles I and IV of the constitution of the U S A; Articles 7 and 60 of the constitution of Switzerland, and Article 121 of the constitution of Canada.

(vi) *Secession*. It is possible that one or more of the units may, as the southern states of the U.S.A did in 1861, claim the right of secession from the whole. The secessionists in the U.S.A. argued that the general government emanated from the people of the several states, forming distinct political communities and acting in their separate and sovereign capacity, and not from all the people forming one aggregate political community. 'The constitution of the United States is, in fact, a compact to which *each State is a party* . . . the several states or parties have a right to judge of its infractions; and in case of a deliberate, palpable, and dangerous exercise of power not delegated, have the right also, in the last resort, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.' Those who opposed the right of secession argued that *the people of the country as a whole* were the real parties to the union, and not the states, and cited in evidence the preamble to the constitution.

'We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America'

Arguments apart, the issue in the U S A was decided, by force of arms, against secession. It is interesting to note that the constitution of the U.S.S.R. is unique in recognizing the legal right of secession. Where such a right is not recognized by the constitution, it seems clear, as a matter of constitutional theory, that the units do not have it. The only legal method for a unit to regain its sovereignty would appear to be an amendment of the constitution permitting the unit to go out of the Union. Sovereignty in a federal State 'lies in the body, wherever and whatever it may be, which has power to amend the constitution. Legally speaking, this sovereign body can entirely abolish the federation and restore each member of it to its original independence.'<sup>1</sup> It is difficult, however, to see how a federal State can prevent a determined unit from seceding except by force of arms; no constitutional provisions seem adequate to meet such a situation.

<sup>1</sup> Leacock, *Elements of Political Science*, p 228

## §5 MERITS AND DEFECTS

The unitary State has, as compared with the federal State, two distinct advantages

(i) "The whole problem of the organization of a government is enormously simplified when the decision is made to establish a unitary government"<sup>1</sup> The constitution-making body does not have to concern itself, as it must in a federation, with the manner in which the territory shall be divided into political divisions nor the manner in which governmental powers shall be divided between two authorities The territorial distribution of power (between the Centre and local bodies) is a matter of internal organization to be decided by the Central Government. The prolonged discussions at the Round Table Conferences in London, which set about drawing up a federal constitution for India, afford ample illustration of the difficulties in a federal constitution. Further the distribution of powers made by the constitution of a federal State is modifiable only by a special procedure, for federal constitutions must necessarily be rigid And it is found, notably in the U S A and in Australia, that because of the difficulty of getting the amending body into operation, the changes in the constitution do not keep pace with the changes in the social and economic life of the State. For example, child labour could be abolished easily in England; its abolition was found difficult in the U S A In the unitary State also, the identical difficulty may arise when its amending body is of the same cumbrous type, but at any rate the difficulty is not further complicated by a constitutional division of powers with its attendant traditions of state loyalty and the support of vested interests Federalism, therefore, incidentally tends to produce conservatism<sup>2</sup> 'The difficulty of altering the constitution produces conservative sentiment, and national conservatism doubles the difficulty of altering the constitution.'

(ii) A unitary State is, other things being equal, stronger than a federal one Here, all the powers of government are concentrated in the hands of one single set of authorities All the force of government can, therefore, 'be brought to bear directly upon the problems of administration to be solved There can be no conflict of authority, no conflict or confusion regarding

<sup>1</sup> Willoughby, *The Government of Modern States*, p. 174

<sup>2</sup> Dicey, *op cit*, pp 173-4



responsibility for work to be performed, no overlapping of jurisdictions, no duplication of work, plant, or organization which cannot be immediately adjusted.'<sup>1</sup> By contrast, in a federal State there are two sets of authorities, each limited by the powers given to the other. That is why, as Dicey said, the comparative weakness of federalism is no accident; it is inherent in it.

'The distribution of all the powers of the State among co-ordinate authorities necessarily leads to the result that no one authority can wield the same amount of power as under a unitarian constitution is possessed by the sovereign. A scheme again of checks and balances in which the strength of the common government is, so to speak, pitted against that of the state governments leads, on the face of it, to a certain waste of energy. A federation therefore will always be at a disadvantage in a contest with unitarian States of equal resources.'<sup>2</sup>

When a question of external policy arises which interests only one part of the union, the existence of states feeling themselves specially affected is apt to have a strong and probably an unfortunate influence. Another source of weakness in a federation is the divided allegiance of the citizens. This may give rise to the dissolution of the State by the rebellion or secession of states, and to division into groups and factions by the formation of separate combinations of the component states.

The great advantage of the federal State is the principle of compromise between unity and diversity which it embodies. It provides the means of uniting a number of small states into one nation under one national government, without extinguishing their separate Legislatures and Administrations.<sup>3</sup> The argument of the preceding paragraph, that the federal government is weak as compared with a unitary one, presupposes that a choice is open between them. But the history of federations shows that often the choice is only between complete independence of the units, with the consequent weakness of all, and federalism with greater strength for every one. As Dicey truly says, 'a federal system sometimes makes it possible for different communities to be united as one State when they otherwise could not be united at all. The bond of federal union may be weak, but it may be the strongest bond which circumstances allow.' In such circum-

<sup>1</sup> Willoughby, *op cit*, p 177.

<sup>2</sup> Dicey, *op cit*, pp 171-2, and p 605

<sup>3</sup> See Bryce, *The American Commonwealth*, ch XXX, for a good discussion of the merits of federation

stances, federalism helps a number of small states to obtain greater strength through union while ensuring their individuality in essentially local matters. It recognizes the fact that closer union is necessary for some purposes, while separate existence is necessary to provide for diversity. It thereby prevents the rise (by force) of a despotic Central Government absorbing other powers and menacing the private liberties of the citizen, and, by creating many local Legislatures with wide powers, relieves the national Legislature of a part of that large mass of functions which may otherwise prove too heavy for it.

There is another series of advantages which a federal State provides, but they apply equally to unitary States which allow a large measure of decentralization. These are the advantages pertaining to local self-government on a large scale. Self-government stimulates the interest of people in the affairs of their neighbourhood, sustains local political life, educates the citizen in his daily round of civic duty, teaches him that perpetual vigilance and the sacrifice of his own time and labour are the price that must be paid for individual liberty and collective prosperity. Further it conduces to the good administration of local affairs by giving the inhabitants of each locality due means of overseeing the conduct of their daily administration.<sup>1</sup>

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<sup>1</sup> Bryce, *op. cit.*

## RIGID AND FLEXIBLE CONSTITUTIONS

## §1 WRITTEN AND UNWRITTEN CONSTITUTIONS

States, we have said earlier, may be classified according to the nature of their constitutions, whether they are flexible or rigid. The question may be raised whether constitutions may also be classified according as to whether they are written or unwritten.

A written constitution may be described as one in which the fundamental principles concerning the organization of a government, the powers of its various agencies and the rights of the subjects, are written down in one document (or a few documents as in the French constitution of 1875) Thus the constitution of the United States of America (1789) outlines the composition of the Legislature, the Executive, and the Judiciary and their powers, and the fundamental rights of citizens; and, besides, mentions a method for its amendment

An unwritten constitution, by contrast, is one in which the fundamental principles of the organization and powers of a government are not codified in one document, but where many of them are followed as a matter of usage The constitution of Britain is a good example.

‘The English have left the different parts of their constitution just where the wave of history had deposited them; they have not attempted to bring them together, to classify or complete them, or to make a consistent and coherent whole’<sup>1</sup>

Of the eleven modern constitutions we have surveyed, the British constitution alone is unwritten.

It is interesting to note that, as a matter of history, written constitutions have been, relatively speaking, of recent growth. The first considerable attempts at written constitutions in modern times were made in the American colonies<sup>2</sup> when they

<sup>1</sup> M. E. Boutmy, *Studies in Constitutional Law*, p. 7, cited by Marriott in *The Mechanism of the Modern State*, Vol. I, p. 153

<sup>2</sup> Britain tried two experiments in this direction, ‘the agreement of the People’ (1649) and ‘the Instrument of Government’ (1653) but neither became a permanent part of her constitution

## §1] WRITTEN AND UNWRITTEN CONSTITUTIONS

became independent of Great Britain. New Hampshire, South Carolina, Virginia, Pennsylvania and Maryland, among others, each adopted a written constitution in 1776, Georgia and New York followed suit in 1777, and Massachusetts in 1780. The U.S.A. adopted its constitution in 1789. On the continent of Europe, France set the example. After the *ancien régime* was destroyed by the Revolution of 1789, she adopted a written constitution in 1791; since then France has tried twelve other written constitutions and the thirteenth is said to be in preparation. One after another, the European States followed the French example<sup>1</sup> and adopted written constitutions; indeed, not only in Europe but in Asia, America, and Australia the written constitution became the rule. Further, no State which has once tried the written constitution has ever returned to the unwritten type.

The documentary constitution differs from the unwritten one not only because it is a document. It supplies a standard of reference to which the acts of the Government of the day may always be compared. And, since its framers contemplate it as the fundamental law of the nation, which ought not to be lightly changed, they invariably<sup>2</sup> make it rigid, i.e. unalterable by the ordinary law-making process; unwritten constitutions can hardly be rigid.

While the written constitution can thus in a general way be distinguished from the unwritten one, it is hardly adequate to classify constitutions on the ground of their written or unwritten nature, for the written or unwritten nature *as such* has not much political significance. Further, such a classification is on the whole misleading. First, it wrongly suggests the idea that the written constitutions have no unwritten elements, and vice versa. Our survey, particularly of the governments of the United States of America and Britain,<sup>3</sup> makes it clear that constitutions in general contain both elements, the written and the unwritten. Second, it wrongly suggests, at any rate to the layman, that the Acts of the Legislature in every State with a written constitution are void if repugnant to that constitution. Indeed, in a famous judgement,<sup>4</sup> Chief Justice Marshall himself expressed this view.

<sup>1</sup> e.g. Spain in 1808, 1812 and 1876, Bavaria in 1818; Italy in 1848; Prussia in 1850, Germany in 1919; and so on.

<sup>2</sup> There are written constitutions which are flexible, e.g. Italy, New Zealand and Finland.

<sup>3</sup> See above, ch. XVI, §§2 and 16, and ch. XVIII, §9.

<sup>4</sup> *Marbury v. Madison*, 1803.

‘Certainly all those who have framed written constitutions contemplate them as forming the fundamental paramount law of the nation, and consequently the theory of *every* such government must be that an act of the Legislature, repugnant to the constitution, is void.’

As a matter of fact, this is not true. In France, the Judiciary does not claim the power to declare the Acts of the Legislature unconstitutional, primarily because the Judiciary does not owe its existence to the constitution but is itself created by an act of the Legislature, and that Legislature can take effective steps to prevent the Judiciary from exercising any such power. In Switzerland, the constitution itself, as we have seen,<sup>1</sup> specially lays down that the Federal Tribunal shall administer the laws passed by the Federal Assembly. A somewhat similar provision is found in the constitution of the U.S.S.R.<sup>2</sup> The Italian constitution of 1848 made no provision for its amendment; the absence of any such provision has been interpreted to mean that the Legislature can make amendments to the constitution, and no question of repugnancy arises.

## §2 RIGID AND FLEXIBLE CONSTITUTIONS

A more adequate basis on which constitutions may be classified is the method for their amendment. If that method is the same as that for the passing of ordinary laws, the constitution is ‘flexible’, if it is a different one, the constitution is ‘rigid’. Britain and Italy<sup>3</sup> have flexible constitutions; all the other States in our survey have rigid constitutions.

Rigid constitutions, however, vary considerably both in the methods they provide for constitutional amendment and in the extent of difficulty they experience in adjusting themselves to changing times. Our survey suggests that rigid constitutions are, broadly, of four types.

(i) Those in which the Legislature may make constitutional amendments, but subject to certain restrictions not prescribed for passing ordinary laws. The constitutions of the French Republic, South Africa, and the U.S.S.R. fall under this head. The restrictions themselves are not the same everywhere. A joint session of the chambers of the Legislature with an absolute

<sup>1</sup> See above, ch XX, §3

<sup>2</sup> See above, ch XXI, §5

<sup>3</sup> Other States with flexible constitutions are New Zealand and Finland

## §2] RIGID AND FLEXIBLE CONSTITUTIONS

majority for the passing of constitutional amendments, as in France, a joint session with a two-thirds majority for the passing of *some* constitutional amendments, as in South Africa; and a two-thirds majority in each of the two chambers of the Legislature, as in the U S S R, are illustrations

(ii) Those in which the final decision is with the people. Australia and Switzerland, as we have seen,<sup>1</sup> make the consent of a majority of the voters necessary for constitutional amendment. In both, the initiative in proposing amendments to the constitution is taken by the Legislature, in Switzerland, in addition, 50,000 voters may also take the initiative. The Weimar constitution also provided for the referendum and the initiative for the passing of such amendments.

(iii) Those in which the final decision is with a prescribed majority of the component units of the federation. Thus Australia and Switzerland make the consent of a majority of the units essential in addition to the consent of a majority of the voters. The United States of America requires a three-fourths majority of the states. In Australia and the United States of America another restriction is added. in respect of amendments to certain essential matters, such as the changing of the territorial limits of the states in Australia, the consent of the affected state is required. The motive for prescribing restrictions of this kind (to protect the smaller units of a federation from being dominated by the larger) has been noted elsewhere. It is, however, noteworthy that *all* federations do not prescribe these conditions, the U S S R and Canada are exceptions.

(iv) Those which leave the final decision in the hands of an outside authority. Canada and the proposed Indian federation (subject to limitations so far as Indian states are concerned) leave the decision to the king in Parliament in Britain.

### *Merits and defects*

The flexible constitution has, clearly, one advantage. In a period of great social changes, new ideas can make their way without being compelled to pass through the complicated machinery for amendment framed in an earlier period. Thus child labour in factories could be abolished easily in England; the proposal for its abolition, made by Congress in the U S A in 1924,

<sup>1</sup> See above, ch XIX, §2 and ch XX, §1

has not yet been ratified by the required number of states. As Bryce remarks,<sup>1</sup> flexible constitutions

'can be stretched or bent so as to meet emergencies without breaking their framework; and when the emergency has passed, they slip back into their old form, like a tree whose outer branches have been pulled on one side to let a vehicle pass'.

That is why it has been said of the English constitution that it bends but does not break

But the defect of a flexible constitution is that it may be in a state of perpetual flux, and may be the plaything of politicians. Because of the ease with which fundamental changes may be made, valuable rules and institutions may be abolished in a transient gust of unpopularity, and thus lose irreparably the stability given by antiquity and unbroken custom.<sup>2</sup> As Sidgwick recognized, this danger varies according to the manner of composition of the Legislature; but certainly it is important enough in the modern democratic State, in which the Legislature is popularly elected for short periods varying from two to five years. In any case, in a properly organized society, it is desirable to impose some restrictions on the power of the Legislature to interfere with such fundamental rights of the citizen as freedom of speech and of religion.

The advantage of a rigid constitution is that it recognizes that there are some fundamentals, be they the rights of citizens or the rules relating to the composition and powers of the agencies of government, which ought not to be lightly changed, and it ensures that adequate consideration will be given to them when it is sought to change them.

On the other hand, the rigid constitution has at least two serious defects. It is not easily adaptable, and it may break under changing conditions or emergencies. This danger is greater in a federal than in a unitary State, on account of the complication caused by the division of powers. It also varies according to the difficulty of the particular amending process; for instance, it is greater in the United States of America than in France. Secondly, under a rigid constitution, the Judiciary may have too much power to decide upon the constitutionality of laws. It is better not to give judges such power, for the constitution will

<sup>1</sup> *Studies in History and Jurisprudence*, Vol. I, p. 168

<sup>2</sup> Sidgwick, *The Elements of Politics*, pp. 561-2

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always reflect the spirit of the time at which it was made, and the judges will, in interpreting the constitution, be better acquainted with that spirit than with the new.<sup>1</sup> If, on the other hand, they try to interpret differently, to adjust the constitution to the changing times, they may be drawn into party conflict, and the confidence in their impartiality thereby be impaired

'And from the same cause, there arises a further danger that the Legislature or the Executive may be tempted to misuse its control over the appointment and dismissal of judges, in order to obtain a tribunal subservient to its wishes, while yet the withdrawal of all control of this kind would leave the judges in too independent a position.'<sup>2</sup>

To avoid both these defects, the following method suggested by H. J. Laski<sup>3</sup> seems the best for constitutional amendment: in unitary States, let a two-thirds majority in Parliament be secured for the passing of constitutional laws, in federal States, let a constitutional law be passed by the federal Legislature by a two-thirds majority in two successive sessions, and if a majority of the states protest against any such change, let it again secure a two-thirds majority in order to become law.

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<sup>1</sup> Laski, *A Grammar of Politics*, p 304

<sup>2</sup> Sidgwick, *The Elements of Politics*, p 564

<sup>3</sup> Laski, *op cit*, pp 305-8



## THE SEPARATION OF POWERS

## §1 THE THEORY OF SEPARATION OF POWERS

Governmental power expresses itself in three forms : legislation, administration and judicial decision. It is of prime importance to the theory of the organization of government to determine whether, and to what extent, these powers should be combined in the same person or body of persons, or should be entrusted to three separate agencies, co-ordinate and mutually independent.

Early in the modern period Bodin,<sup>1</sup> the French writer, pointed out in *The Republic* (1576) that some separation was essential. The Prince, he thought, ought not to administer justice in person, but should leave such matters to independent judges.

‘To be at once legislator and judge is to mingle together justice and the prerogative of mercy, adherence to the law and arbitrary departure from it if justice is not well administered, the litigating parties are not free enough, they are crushed by the authority of the sovereign’<sup>2</sup>

The theory of separation of powers was, however, clearly formulated for the first time by Montesquieu in *The Spirit of Laws* (1748).

‘When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise

<sup>1</sup> 1530-96

<sup>2</sup> Cited by Bluntschli in *The Theory of the State*, p. 517

## §1] THE THEORY OF SEPARATION OF POWERS

those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals'<sup>1</sup>

Seventeen years later Blackstone, an English jurist, gave expression to similar views.

'In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men, and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed in quality of dispenser of justice with all the power which he as legislator thinks proper to give himself. Were it [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the Executive, this union might soon be an overbalance for the legislative'<sup>2</sup>

And, finally, we may cite an American classic, *The Federalist* (1788), for another authoritative exposition of the theory.

'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'<sup>3</sup>

There has been some controversy<sup>4</sup> among students of political science whether Montesquieu, the author of the theory (and others who followed him), contemplated an absolute or only a limited separation of the three powers. There is no doubt that the sound opinion, as *The Federalist* pointed out,<sup>5</sup> is that he did *not* mean that the three departments ought to have no *partial* agency in, or no *control* over, the acts of each other. His meaning, 'as his own words import, and still more conclusively, as illustrated by the example in his eye (*viz* the British constitution), can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted'.

<sup>1</sup> *The Spirit of Laws*, bk. XI, ch. VI

<sup>2</sup> 1765, *Commentaries on the Laws of England*, Vol. I, pp. 146 and 269

<sup>3</sup> *The Federalist*, Essay XLVII

<sup>4</sup> See, e.g., G. H. Sabine, *A History of Political Theory*, p. 559

<sup>5</sup> loc. cit.

Rightly interpreted, therefore, the theory of separation of powers merely means that a different body of persons is to administer each of the three departments of government ; and that no one of them is to have a *controlling* power over either of the others. Such separation is necessary for the purpose of preserving the liberty of the individual and for avoiding tyranny.

## §2 ITS APPLICATION TO MODERN GOVERNMENTS

Before we consider to what extent the legislative, the executive, and the judicial powers in modern governments are combined and separated, it is useful to have some idea of what complete separation involves. It means a Legislature elected directly by the people for a fixed term ; an Executive elected directly by the people, or indirectly by an electoral college as in the United States of America, for a fixed term and independent of the Legislature in discharging its function ; and judges similarly elected, and independent of both the Legislature and the Executive in respect of their term of office and their salary. The Legislature will not have the power of choosing, controlling, or dismissing the Executive or the Judiciary ; the Executive will not have the power of dissolving the Legislature or vetoing laws or of appointing and dismissing judges ; the judges will not have the power of declaring laws unconstitutional or of trying executive officers.

If we look into the constitutions of several States, we find that there is not a single instance in which the three departments of power have been kept absolutely separate and distinct. Instead, we find some union and some separation. This may be illustrated from Britain, the United States of America, and the French Republic

### *Britain*

In Britain, the Executive forms an integral part of the Legislature, the cabinet being considered as 'the first legislative chamber'. The cabinet is chosen from the Legislature. Ministers take part in its proceedings, may initiate laws, and have power to issue statutory orders. The cabinet has power to advise the dissolving of the House of Commons before its normal term of five years is over, and to recommend the creation of peers in the House of Lords. On the other hand, the Legislature has

## §2] ITS APPLICATION TO MODERN GOVERNMENTS

power, by refusal of supply and other methods, to terminate the term of the cabinet.

The Executive appoints the judges; and, further, it has been vested in recent times with power to try certain cases<sup>1</sup> On the other hand, according to the principle of the rule of law, the judges have power to sit in judgement on the conduct of government officials.

The Legislature has power to present an address to the Crown for the removal of judges. The second chamber is also the final court of appeal for the United Kingdom of Great Britain and Northern Ireland.

But there is *some* separation of powers as well in the British constitution:

'A close study of the English Government in its practical working shows that, *organically*, the principle of the separation of powers has been carried out with a rigidity, that is found in few or no other governments'<sup>2</sup>

The exercise of legislative power is vested in the Legislature, which is a department of government distinct from the Executive<sup>3</sup> The executive power is vested in the Crown, and Parliament never attempts to deprive it of any of its executive powers, nor takes to itself the function of administration<sup>4</sup>

In like manner, the Judiciary has been established as a distinct and independent branch of the government Judges hold office during good behaviour, and are not liable to be dismissed by the Executive. Their salaries are independent of annual budgetary provision, being a permanent charge on the Consolidated Fund

### *The United States of America*

The framers of the constitutions of the states in the United States of America consciously adopted the principle of the separation of powers The Massachusetts constitution of 1780<sup>5</sup> explicitly declared:

'In the government of this commonwealth, the Legislative

<sup>1</sup> See above, ch XVI, §13

<sup>2</sup> Willoughby, *op cit*, p 238, italics ours

<sup>3</sup> Though members of the cabinet are chosen from Parliament, for the Executive is only a part of the Legislature and not the whole of it

<sup>4</sup> In the U. S. A. treaties and appointments require confirmation by the Senate for their validity, no such rule obtains in Britain

<sup>5</sup> Article XXX

department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them to the end it may be a government of laws and not of men’

The popular election of executive officials and of judges so widely prevalent in the states is an attempt at a rigid application of the theory. So too the constitution of the United States of America is an essay in the theory of separation. The separation is evident in the relations between the Legislature and the Executive. Congress and the President are (the former directly and the latter indirectly) elected by the people for fixed terms; the President and the heads of departments do not sit in Congress, or initiate laws, and Congress cannot be dissolved by the President before it has run its term. The separation is also evident in the relation between the Executive and the Judiciary. the term of the judges is made independent of the Executive.

Yet, even here, there are many points of contact between the Legislature, the Executive, and the Judiciary. The President sends messages to Congress; he has a suspensive veto over the laws passed by it; and heads of departments appear before the committees of Congress. The Senate’s consent is necessary for the appointments made by the President, and the treaties negotiated by him. The House of Representatives may impeach the President before the Senate. The President appoints the judges, and has the power of pardon except in cases of impeachment. Judges may sit in judgement over the conduct of government officials, and they have the power to declare laws passed by Congress unconstitutional.

### *The French Republic*

In the government of the French Republic, also, we find some union of powers and some separation. The election of the President by the Legislature, the President’s suspensive veto, the cabinet system, the power of the Legislature to impeach the President and ministers; the President’s power to appoint judges and his power of pardon illustrate the former; the existence, as elsewhere, of three distinct organs of Government to perform the work of legislation, administration and judicial decision,

§3]. *IS SEPARATION DESIRABLE AND PRACTICABLE?*  
and the system of administrative jurisprudence, illustrate the latter.

§3 *IS SEPARATION DESIRABLE AND PRACTICABLE?*

Sufficient has been said to indicate that a complete separation of the Legislature, the Executive, and the Judiciary is not found in any modern constitution. All constitutions recognize the fact that government is an organic whole. Therefore, the separation of powers necessary for the maintenance of liberty has to be reconciled with the need for their co-operation with, and dependance on, each other. They realize that some union of powers promotes harmony in government and some separation makes for liberty, while both are essential for efficiency. The question naturally arises as to what extent separation is desirable and practicable.

A detailed study of the proper organization of the relationship of the Legislature to the Executive, the Legislature to the Judiciary, and the Executive to the Judiciary—which allows for partial union as well as partial separation—is attempted in the chapters that follow,<sup>1</sup> here it is sufficient to draw attention to two general principles. First, the principle of vesting the exercise of the three powers of government—the legislative, the executive, and the judicial—in three distinct organs, which Willoughby has called an *organic* separation of powers as distinct from a *personal* separation, is fundamental to the efficient working of government. More than one department may be under the *direction* of the same persons as regards their superior officers, as the legislative and the executive departments in Britain are directed by the cabinet, what is essential is that each department should in the main confine itself to the work which properly belongs to it. This is merely the political application of the economic principle of division of labour, it makes for specialization and efficiency. It is obvious, for instance, that the Legislature as a body is unfit to undertake the work of judges, because it is subject to the influences of party politics, 'because its organization as well as its temper is out of accord with the judicial spirit, and because its members are not chosen for their capacity or training'. And, second, no one department should have *absolute* control over the other two, for that is inimical to

<sup>1</sup> See below, ch XXVIII, §1, XXIX, §§1, 2 and XXX, §2

liberty. If, for instance, the Executive has absolute control over the Judiciary, justice cannot be impartial, and the freedom of the individual is bound to suffer. Within the limits set by these two general principles, there must be points of contact and interaction between the three departments, so that there may be the maximum harmony and co-operation between them in the essential tasks of government.

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## CHAPTER XXVII

# THE ELECTORATE

### §1 SUFFRAGE

Representative government as distinguished from direct democracy is based on the principle that popular *sovereignty* can exist without popular *government*. The primary means by which the people exercise their sovereignty is the vote. Those who are qualified by the law of the State to elect members of the Legislature form the electorate

As our survey has shown, there is no uniformity in modern States regarding the constitution of the electorate. The broad distinction is between States in which the right to vote is given to all adult citizens<sup>1</sup> and those in which the right to vote is restricted to adults, or only men, who possess specified qualifications in respect of race, property or education. Britain, the U.S.A., Canada, Australia, Germany, and the U.S.S.R. are instances of the former, France, South Africa, Switzerland, and India, of the latter. Everywhere, too, those who cannot or those who are obviously unfit to use the vote (such as persons of unsound mind and criminals) are disfranchised. A residence requirement, of three to six months' stay in a constituency, is also invariably insisted upon.

The point naturally arises as to the principle on which a State may decide in favour of adult or restricted suffrage, or having decided against adult suffrage, its grounds for deciding on a particular kind of restriction such as property, education, race, or sex. It was widely held by theorists in the nineteenth century that every individual had 'the inalienable and sacred right' to participate in the formation of the law and that no one could be deprived of this 'upon any pretext or in any government'. The Declaration of the Rights of Man roundly asserted:

<sup>1</sup> The age at which a person is considered to be an adult for purposes of voting varies from State to State. In Russia it is eighteen, in Germany, twenty, in Great Britain and the U.S.A., twenty-one, in Norway, twenty-three, in Denmark and Japan twenty-five.



‘The law is an expression of the will of the community ; *all* citizens have the right to concur, either personally or by their representatives, in its formation.’

Adult suffrage may indeed be supported by several strong arguments. (i) It is a personal injustice to withhold from any one, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people<sup>1</sup> ‘If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should legally be entitled to be told what for ; to have his consent asked, and his opinion counted at its worth.’ (ii) Political equality is a basic principle of democracy , any form of restricted franchise necessarily infringes the principle of equality between individuals in some degree. (iii) If the right to vote is denied to some, their interests may be overlooked by the Legislature. As J. S. Mill pointed out

‘Rulers and ruling classes are under a necessity of considering the interests and wishes of those who have the suffrage ; but of those who are excluded, it is in their option whether they will do so or not, and, however honestly disposed, they are in general too fully occupied with things which they *must* attend to, to have much room in their thoughts for anything which they can with impunity disregard’<sup>2</sup>

These arguments have not, however, been allowed to pass unchallenged It has been urged<sup>3</sup> that (i) where there is *prima facie* proof that those who have been excluded will not suffer by exclusion, their interests being adequately cared for by the representatives of those included, their disfranchisement is justified The political interests of wives, daughters, and sisters, for instance, are safe in the hands of husbands, fathers, and brothers, on account of the intimate relations of affection that bind the members of the family. (ii) The exclusion of a class is justifiable when that class is likely to make a dangerously bad use of the vote. The ignorant masses, according to many competent writers,<sup>4</sup> come under this category Enfranchising them might, thought Macaulay, lead to one ‘vast spoliation’, ‘a few half-naked fishermen would divide with the owls and foxes the ruins

<sup>1</sup> Mill, *Representative Government*, ch VIII

<sup>2</sup> *ibid*

<sup>3</sup> See Sidgwick, *The Elements of Politics*, p 379

<sup>4</sup> e.g. Macaulay, W E H Lecky, H S Maine, and Sir James Stephen

of the greatest of European cities' <sup>1</sup> It might, thought Sir Henry Maine, work against scientific progress

'Universal suffrage, which today excludes free trade from the United States, would certainly have prohibited the spinning jenny and the power loom It would certainly have prohibited the threshing machine It would have prevented the adoption of the Gregorian calendar, and it would have restored the Stuarts' <sup>2</sup>

Sir James Stephen went so far as to remark that universal suffrage tended to invert what he regarded as 'the true and natural relation between wisdom and folly' <sup>3</sup> The main deduction made from these counter-arguments is that suffrage should be based in part upon education and property, so that only those who are able to read and write, and those who have some stake in the country, should be allowed to elect representatives to the Legislature

These considerations suggest the thought that, while adult suffrage is certainly the ideal, the constitution of the electorate at any particular time is a matter to be adjusted in accordance with the particular conditions of each State Take, for instance, the enfranchisement of women As Willoughby suggests,<sup>4</sup> this should be influenced largely by the attitude taken by women themselves, the legal and social status of the women in the community concerned, and the extent and character of their education and general training Again, the extension of the franchise, which might be feasible and desirable in a settled community long accustomed to the exercise of the powers of self-government, might be impracticable and undesirable in the case of a community beginning to learn the art of self-government The extent of literacy is a factor to be taken into consideration If universal suffrage is introduced in a community, the vast majority of whom are illiterate, multitudes may simply cast their votes as directed by other individuals or organizations Under such conditions, Mill's wise saying that universal teaching must precede universal enfranchisement must be heeded The administrative difficulty of managing a vast electorate, of ensuring an adequate supply of reliable and impartial returning officers

<sup>1</sup> Quoted by Fisher in *The Republican Tradition in Europe*, p 274

<sup>2</sup> *Popular Government*, p 36

<sup>3</sup> *Liberty, Equality, Fraternity*, pp 258-9

<sup>4</sup> *The Government of Modern States*, p 273

and polling officers, is sometimes a major consideration, as it was in India when the electorate was extended under the constitution of 1935.

## §2 MODES OF ELECTION AND OF VOTING

Should election be direct or indirect? <sup>1</sup> Of the (elected) legislative bodies we have studied, only the Senates of France and South Africa and the House of Assembly in the proposed Indian Federation are indirectly elected bodies. All others are directly elected. The system also obtains, at least in name, in respect of the election of the President of the United States of America.

The argument for indirect election is, in theory, a strong one. The electors who are finally to choose the members of the Legislature may be expected to be more competent at their job than the citizens who elect them. Being comparatively few, they should be less moved than the demos by the gusts of popular passion, and, therefore, their choice should be more careful and enlightened, and be made with a greater feeling of responsibility, than election by the masses themselves. This should tend to improve the quality of the Legislature.

But experience with the indirect system of election has not confirmed this deduction from abstract reasoning. The successful working of the system demands an honesty of purpose and independence, both in the primary voters and the intermediate electors, which rarely obtain. If the latter are chosen under pledges, as invariably they are, the whole meaning of indirect election is lost. Indirect election also has positive disadvantages. As the number of persons in whom the final selection is vested is comparatively small, it affords additional facilities for intrigue and for 'every form of corruption compatible with the station in life of the electors'. The possibility of corruption is increased by the fact that, holding no permanent office or position in the public eye, the electors 'would risk nothing by a corrupt vote except what they would care little for, not to be appointed electors again'. Secondly, indirect election is decidedly inferior to direct election as a means of cultivating public spirit; interest in public affairs is considerably less when a middleman is interposed between the voter and his representative.

<sup>1</sup> See Mill on this subject in *Representative Government*, ch IX.

*Secret v public voting*

Vote by ballot (or some form of secret voting) is now the universal practice. But this fact must not lead one to think that public voting was at no time prevalent or that it has no advantages. It was in use till recently in Denmark,<sup>1</sup> Prussia,<sup>2</sup> and the USSR.<sup>3</sup> The case for public voting is in theory unassailable: voting is a public responsibility, and, therefore, its exercise should also be public. If the suffrage is a trust, asked Mill,<sup>4</sup> if the public are entitled to a person's vote, are they not entitled to know his vote? Under the system of secret voting, the voter is free from the sense of shame or public responsibility; he may, therefore, be tempted to abuse his trust, to further his own or a class interest.

If, in spite of such a clear case, public voting has disappeared in modern States, it is because its working revealed a serious practical defect: the possibility of the coercion of the voter. If a citizen has to vote in public, he may be compelled to vote for particular persons, whose pressure he may not be able to withstand. The experience of Prussia till 1920 may be cited in proof.<sup>5</sup> The Government took advantage of the opportunity which public voting afforded to exert pressure upon the electors to vote for government candidates, and landholders and employers did likewise in respect of those who were more or less subject to their control. The result was that large numbers of voters, rather than be exposed to intimidation of this kind or to loss of their positions through having their votes known to the public, abstained from voting.

Clearly, in circumstances like these, where a free vote cannot be given, secret voting is preferable to public voting. But, where a community is sufficiently enlightened and its members are sufficiently courageous to withstand improper pressure, public voting is certainly desirable.

## §3 THE DUTY OF A REPRESENTATIVE

There are two views concerning the essential nature of an elected representative. According to one, he is simply an agent or delegate, an ambassador, who has to vote in the Legislature

<sup>1</sup> Till 1901<sup>2</sup> Till 1920<sup>3</sup> Till 1936<sup>4</sup> *Representative Government*, ch. X<sup>5</sup> Garner, *Political Science and Government*, p. 585

according to the instructions, the mandate, of his constituents. According to the other, he is a senator, who is chosen for his superior wisdom and integrity, and who is, therefore, free to use his best judgement upon the issues he is called upon to decide. The former may be called the theory of instructed representation;<sup>1</sup> the latter, of uninstructed representation.

The theory of instructed representation errs in several respects. (i) It is impossible in practice for any member to state his total views partly because there is not the time to do so, partly because new issues are bound to arise. 'And upon those new issues he cannot, item by item, consult his constituents in such a fashion as to elicit from them their considered judgement.' Nor is it possible for the constituency, on their initiative, to instruct their member in all matters that come up before the Legislature. (ii) It makes deliberation in Parliament ineffective, for, by assumption, the member has arrived at his final decision before Parliamentary deliberation begins. Indeed, as Burke rightly saw,<sup>2</sup> it would result in an absurd state of affairs in which the determination precedes discussion, in which one set of men deliberates and another decides, and where those who form the conclusion are far away from those who hear the arguments. (iii) It is immoral, for it demands the sacrifice of the judgement and conviction of the representative in favour of those of others. (iv) It may affect the quality of the Legislature. Men of superior intellect and integrity will hardly seek election to a place in which they are not free to think for themselves, and vote according to their conscience. The community is therefore the loser. (v) It emphasizes local interests and local opinion to the possible prejudice of common interests and of 'the general good resulting from the general reason of the whole'.

On the other hand, we should not jump to the opposite conclusion and say that the representative is a master who is always at liberty to disregard the fundamental convictions of his constituency. The right view to take is somewhat as follows. A representative is elected by a constituency to confer with representatives who come from other parts of the country as to what is best for the nation as a whole. He must be reasonably con-

<sup>1</sup> Sometimes also called the telephone theory of representation

<sup>2</sup> Speech to the electors of Bristol, on 3 November 1774 *The Works of Edmund Burke*, Vol II, 'The World's Classics', pp 159-66

#### §4] SINGLE- V. MULTI-MEMBER CONSTITUENCIES

sistent in his views Plainly, as Laski suggests, he is not entitled to get elected as a free trader and to vote at once for a protective tariff The electors are, therefore, 'entitled to a full knowledge of the political opinions and sentiments of the candidate, and not only entitled, but often bound, to reject one who differs from themselves on the few articles which are the foundation of their political belief'<sup>1</sup> The representative must also be reasonably industrious Burke has said that it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence and the most unreserved communication with his constituents Their wishes ought to have great weight with him, their opinions, high respect, their business, unremitted attention, otherwise, indeed, he simply does not perform his duty From his central position in the constituency, he has a unique opportunity to instruct his constituents and to broaden their horizon And, finally, the representative should be allowed freedom of judgement, i.e. freedom to vote according to *his* judgement, even when it differs from that of his constituents The whole matter is authoritatively summed up in Burke's eloquent address to the electors of Bristol.

'To deliver an opinion is the right of all men, that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider But *authoritative* instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgement and conscience—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution

Parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates, but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole You choose a member indeed, but when you have chosen him, he is not member of Bristol, but he is a member of *Parliament*'

#### §4 SINGLE- V. MULTI-MEMBER CONSTITUENCIES

It is the practice in all countries to divide the whole territory

<sup>1</sup> Mill, *Representative Government*, ch XII

into convenient electoral districts (single-member or multi-member) primarily for the purpose of enabling the member to keep in touch with his constituency. Practically every State in our survey, except Germany, Italy and to some extent India, has adopted the single-member plan; Germany has a multi-member system, Italy, a corporative structure, which, as has been explained, is somewhat peculiar; and India has both single-member and multi-member constituencies.

The single-member constituency (sometimes called the district system) satisfies one important requisite of a good electoral system—that areas which return members to the Legislature must be small enough to enable candidates to be known in a genuine way, and also to enable the finally elected member to keep in close touch with his constituents. It is simple and economical, especially for the candidates; therefore it is more democratic because the poor candidate is not at such a disadvantage as he would be in a larger constituency. It is more likely to encourage local talent than the larger multi-member constituency, because men of moderate means and position will feel more confidence where the constituency is small and their local influence counts. Further, it is clearly an advantage that more and more leaders of the community should be induced to take an active interest in the political process. Above all, the working of electoral systems throughout the world points to the fact that the single-member system tends to provide a more stable majority in a Legislature than the multi-member system, and thereby helps to form a strong Executive. The multi-member system, generally coupled with provisions for minority representation, encourages the multiplication of groups<sup>1</sup> in a Legislature, making it difficult for any one group to command a majority, and, therefore, to work a parliamentary Executive.

The single-member system, however, is not without its defects. (i) Election from small districts greatly facilitates the power of the Government to control the elections, for the smaller the district the more easily can it influence a sufficient number of voters to obtain the return of government candidates. This was the experience of France under the single-member system, and constituted one of the principal reasons which induced her, in 1919, to abandon it for a time. (ii) It leads to the choice of men

<sup>1</sup> See below, §5 of this chapter

#### §4] SINGLE- V MULTI-MEMBER CONSTITUENCIES

who regard themselves as representatives of local interests rather than as representatives of the interests of the country as a whole. The experience of both France and Italy with the single-member system of choosing deputies substantiates this<sup>1</sup> As Gambetta once said, it made the Chamber of Deputies 'a broken mirror in which France could not recognize her own image' (iii) It increases powerfully the temptation of legislative majorities to 'gerrymander' the State, that is, to construct the electoral districts in such a way as to give the majority party more representatives than its voting strength entitles it to (iv) In certain circumstances, it results in the return of the candidate disliked by the bulk of the constituency, thus tending to distort the representative system This might occur when more than two candidates contest the one seat, as the following hypothetical instance shows Suppose at an election 1,000 votes are cast, divided amongst four candidates as follows A 280, B 260, C 240; D 220 A is returned But it is quite possible that A is disliked by the majority of the voters The inadequacy of the system increases with the number of candidates And if a number of members were returned in this way, the majority in the Legislature might well be elected by a minority of voters Thus, in 1924, the Conservative Party in Britain secured 412 seats out of a total of 615, though they had the support of only 48% of the voters (v) Finally, it is possible under this system that minorities may not be adequately represented in the Legislature. The inadequacy varies according to the distribution of the minorities in the country Theoretically it is possible for a minority group to be a minority in every constituency, and, therefore, to go without any representation at all. But this rarely obtains It is significant that Gladstone, while introducing the Redistribution Bill of 1885, defended the single-member system on the ground that it provides for minority representation

'The recommendations of this system I think are these—that it is very economical, it is very simple, and it goes a very long way towards that which many gentlemen have much at heart—namely, what is roughly termed representation of minorities It may be termed the representation of minorities, it may be termed the representation of separate interests and pursuits, but give it what name you like, there is no doubt that by means of one-

<sup>1</sup> Garner, in *The American Political Science Review*, Vol VII, pp 610 ff



member districts, you will obtain a very large diversity of representation' <sup>1</sup>

Nevertheless there is the possibility that the minorities may not be represented adequately, i.e. in proportion to their voting strength. Thus in the British election of 1924, referred to above, the Liberal Party secured less than 8% of the seats though their voting strength was as high as 20% and the Labour Party, 25%, though their voting strength was about 34% of the whole <sup>2</sup>

### §5 THE REPRESENTATION OF MINORITIES

Minorities are of various kinds. political, national, racial, linguistic, and communal. It is an accepted proposition in Politics that the majority in a democratic State have the right to *decide* on the passing of a law; it is equally accepted that in the *deliberation* which precedes decision, the voice of the minorities should be heard through representatives who enjoy their confidence. For law must be built on the widest acquiescence if it is to command effective obedience; and the best way to ensure such wide acquiescence is to provide opportunities for the adequate expression of minority opinion, and for the majority to accept the reasonable wishes of minorities. Where large groups of men feel that their wishes are not taken into consideration in the framing of the laws which they are compelled to obey, the way is open for discontent and rebellion.

Among the methods which have been adopted for the adequate representation of minorities, the most important are described under the five following headings.

(i) *Proportional representation*. The principle underlying this system is that, in a real democracy, every section of opinion should be represented in the Legislature in proportion to its strength in the country. 'A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives.' Proportional representation may be achieved by two methods; by the single transferable vote or by the list system.

<sup>1</sup> Quoted in *The Report of the Royal Commission appointed to inquire into Electoral Systems*, 1910, p. 2

<sup>2</sup> Conservative Party	7,451,132 votes	412 seats
Liberal Party	3,008,474 votes	46 seats
Labour Party	5,484,760 votes	151 seats

## §5] THE REPRESENTATION OF MINORITIES

The essentials of the 'single transferable vote' are 'the multi-member constituency, the quota, the possession by the voter of only *one* vote, the marking of preferences, and the transfer of votes. The system demands multi-member constituencies; indeed this type of constituency is essential to any form of minority representation. Further, to be elected, a candidate, instead of getting an absolute majority of votes or a plurality, needs only the quota, i.e. the total number of votes divided by the number of seats<sup>1</sup>. Again, it is essential to the system that, though the constituency returns more than one member, the voter has only *one* vote. He may, however, indicate his preferences for other candidates besides his first choice. Thus if there are eight candidates and only three seats to be filled, the voter may place beside three of the names the numbers 1, 2, 3. His vote is credited to his first choice unless it is found *either* that his first choice does not need it as he has reached his quota, *or* because he has secured so few votes that it cannot possibly help him to be elected. In such a case, the elector's vote is credited to his later choices. When the voting papers are counted, the first choices of the voters are first reckoned. If all the seats are not filled, owing to the fact that a sufficient number of candidates do not get the quota, the other seats are filled by reckoning the second preferences indicated in the surplus votes of the successful candidates. If a sufficient number still do not get the quota, the candidate with the lowest number of votes is eliminated, and his votes are added to others according to the preferences expressed therein, and so on, until the required number of candidates is returned.

It will be observed that every minority which is strong enough to get the quota by itself, or through the aid of other groups as expressed, say, in the second and third preferences, is assured of representation; it will not be sure of it, if a majority of votes or plurality is insisted upon as the criterion of success in election.

This system prevails in Great Britain for the election of Members of Parliament for certain Universities, for the National Assembly of the Church of England, for Education Authorities in Scotland, in Northern Ireland for both Houses of Parliament, in Eire for elections to the lower House, in South Africa for

<sup>1</sup> This is only one (and perhaps the simplest) of the many ways of reckoning the quota. Another is  $\frac{\text{total number of votes}}{\text{number of seats} + 1} + 1$

Senatorial elections and in certain municipalities, in Canada for some municipal elections and in India for certain constituencies of the central and provincial Legislatures <sup>1</sup>

The list system also demands a multi-member constituency. Every party prepares a list of candidates for each constituency. The voter votes for the list he likes (not the candidate), and the seats are divided among the parties in proportion to the number of votes each list has secured. This method was once in vogue in Austria, Belgium, Czechoslovakia, Finland, Germany, Latvia, Lithuania, Poland and Yugoslavia <sup>2</sup>

The merit of proportional representation is obvious; it ensures the representation of every group in the Legislature in proportion to its voting strength, so necessary to give it a sense of security in the State. Parliament will truly be a mirror of the nation, as it must be in a democracy 'which professes equality as its very root and foundation' The single transferable vote also develops civic interest, for the system of preferences implies that the voter must give some time to consider the issues involved.

But it may justly be contended that proportional representation, 'however useful for a debating society, is useless as a means of establishing an instrument of government' For it has been the experience of most countries which have worked it that it leads to the return of a large number of small parties. A system which makes it possible for all parties, however small, <sup>3</sup> to obtain separate representation necessarily encourages such disintegration. This, in turn, leads to the instability of the Executive by necessitating fragile coalition governments, which fall when any section of opinion is outraged. Further, legislation under such conditions is likely to lose all coherence and creative force, because it will be the result of enforced compromise to meet the wishes of several groups. The system encourages 'minority thinking', the voters and the leaders all being encouraged to think in terms of, and to fight for, sectional interests. A Legislature elected on this basis represents a number of isolated interests, it hardly helps to form the general will of the nation. The tie between the elector and the member is bound to be less direct and personal on account of the enlargement of the area

<sup>1</sup> Strong, *Modern Political Constitutions*, p. 178

<sup>2</sup> A. J. Zürcher, *The Experiment with Democracy in Central Europe*, ch. V.

<sup>3</sup> Provided, of course, they are able to secure the quota

## §5] THE REPRESENTATION OF MINORITIES

of the constituency. In the list system, the freedom of choice of the voter is severely curtailed as he cannot express his preference for an individual without voting for the whole party list; and *pari passu* the party organization gains in power. The single transferable vote may be puzzling to voters, and, besides, being so complicated in the process of counting, may place them at the mercy of the counting authority. For these reasons, the bulk of competent opinion is against proportional representation<sup>1</sup> 'To establish the system is to organize disorder and emasculate the legislative power, it is to render cabinets unstable, destroy their homogeneity, and make parliamentary government impossible'

(i) *The single non-transferable vote*<sup>2</sup> The distinctive element of this scheme is that each elector may exercise only one vote, no matter how many representatives are to be elected. In a constituency having 500 voters and five representatives, each voter will be given only one vote. There will therefore be 500 votes and no more. If any candidate obtains 100 votes, he will be sure of election. Thus the system ensures representation for minorities of any considerable size.

(ii) *The limited vote* is so called because each voter is allowed to vote only for a limited number of candidates, i.e. a number less than that of the seats to be filled. For instance in a constituency returning five members, each elector may be allowed only four votes, or less, no party can then monopolize the representation of the constituency. This system has been tried in Portugal and in some of the states of the U.S.A.

(iii) *The cumulative vote* Under this system the voter is given as many votes as there are seats to be filled by the constituency, but he may spread them over several candidates or concentrate them on one. The power of accumulation enables a numerically weak party to secure some representation by the concentration of its voting power on its own candidate. This has been tried for elections to school boards in England, for electing local officers in some states of the U.S.A. and for parliamentary representation in some of the provinces of India<sup>3</sup>.

(iv) *Communal representation* may be secured either by (a)

<sup>1</sup> H. Sidgwick, H. Finer, and H. J. Laski, among others, are against it. The late Ramsay Muir, however, was in favour of it.

<sup>2</sup> Also called the Japanese system because it prevails in Japan.

<sup>3</sup> e.g. Madras.

separate electorates where the voters of each community vote separately for candidates of their own community, e.g. Hindus vote for Hindu candidates, Muslims for Muslim candidates, and so on, or by (b) the reservation of seats in a joint electorate, in which case the voters may vote for candidates of communities other than their own, but the member of the community (for whom seats have been reserved) securing the highest votes among the candidates of his community will be declared elected in preference to members of other communities who might have secured a larger number of votes. Seats are reserved in this way for the Scheduled Castes within the 'general' seats in Madras. Communal representation was introduced in India for the first time in 1909, at the request of the Muslim community.

The argument urged in favour of communal representation is, primarily, that when people are so divided by race, religion, and caste as to be unable to consider the interests of any but their own community, and when one community does not trust another, communal representation is not merely inevitable but is actually best because it appeals to those instincts which are strongest. Indeed, according to this view, it is an inevitable and even a healthy stage in the development of a non-political people. It is realistic because it takes note of actual conditions, and avoids wishful thinking. Secondly, there is the argument of *status quo* : a safeguard exists and should not be taken away without the consent of the communities concerned, its abolition without their consent would be considered a breach of faith, a cancellation of assurances on which they have been relying for their security.

But, with equal force, it may be urged,<sup>1</sup> communal representation is fraught with the most disastrous consequences for the healthy political development of a nation. (a) As the authors of the Montagu-Chelmsford Report realized, the crucial test to which a proposal of the kind should be subjected is whether it will or will not help to carry India towards responsible government, and they had no hesitation in stating that communal representation would not help in achieving that object. For responsible government rests on an effective sense of common interests. 'The history of self-government among the nations who

<sup>1</sup> On this whole subject see the *Report on Indian Constitutional Reforms*, 1918, paras 227 to 231.

developed it, and spread it through the world, is decisively against the admission by the State of any divided allegiance; against the State's arranging its members in any way which encourages them to think of themselves primarily as citizens of any smaller unit than itself' (b) Again, communal representation perpetuates existing class divisions. It teaches men to think as partisans and not as citizens, and 'it is difficult to see how the change from this system to national representation is ever to occur' That the authors of the joint report were correct in this judgement is proved by events since their time, the demand for Pakistan is but the logical corollary of the introduction of separate electorates (c) The communal system stereotypes existing relations

'A minority which is given special representation owing to its weak and backward state is positively encouraged to settle down into a feeling of satisfied security, it is under no inducement to educate and qualify itself to make good the ground which it has lost compared with the stronger majority. On the other hand the latter will be tempted to feel that they have done all they need do for their weaker fellow-countrymen, and that they are free to use their power for their own purposes. The give and take which is the essence of political life is lacking. There is no inducement on the one side to forbear, or to the other to exert itself'<sup>1</sup>

Unqualified joint electorates are, therefore, the ideal. For a transitional period, i.e. until the minorities learn to have confidence in the reasonableness of the majority, the reservation of seats in a joint electorate may be tried with advantage as a step in promoting that confidence. The argument sometimes urged against this, that the candidate elected under this system is bound to be less communal in so far as he has to seek the votes of all communities, should in reality be considered its strong recommendation.

## §6 POLITICAL PARTIES *End*

### *Their merits*

The representative system in the modern State is closely connected with the political party. A political party, says a classic definition, is a more or less organized group of citizens who act together as a political unit, have distinctive aims and opinions on the leading political questions of controversy in the State,

<sup>1</sup> *ibid.*

and who, by acting together as a political unit, seek to obtain control of the Government It is based on two fundamentals of human nature men differ in their opinions, and are gregarious, they try to achieve by combination what they cannot achieve individually Religious and communal loyalties, and the attachment to a dynasty or leader, also help parties to develop Party enthusiasm is maintained by such elements of human nature as sympathy, imitation, competition, and pugnacity

Parties fulfil certain necessary functions, so necessary, indeed, that many competent thinkers consider them essential to the working of representative government They enable men and women who think alike on public questions to unite in support of a common body of principles and policies and to work together to see that those principles and policies are adopted by the Government of the day. In the mass and without organization, the people can neither formulate principles nor agree on policy Parties make articulate the inarticulate desires of the masses. Out of the innumerable problems which call for solution in a State, they select those which are the more urgent, study them, think out solutions and present them to the people They act, in Lowell's phrase, as the brokers of ideas They preserve a sense of continuity in public policy They organize and educate the electorate, and help to carry on elections They dramatize politics and keep the nation politically alive They sometimes help to discover ability, although only as part compensation for the repression of other abilities Under a two-party system, moreover, they help to maintain a keen and responsible Opposition which puts the Government on their mettle, and give strength and confidence to the Government, so necessary to enable them to plan long-term policies

### *Their defects*

The party system has serious defects, however It lowers the moral tone and the intellectual standards of society Adhesion to the party creed becomes the supreme political virtue Moreover, to keep up the vigour and zeal on one's own side, one has to pretend that there is agreement on the political principles of one's party The party leader has to make the worse seem the better reason, he can seldom afford to speak the whole truth, except perhaps to his intimate circle. The party system thus

encourages hollowness and insincerity. Intellectual honesty is at a discount, for an appeal to the honour of the party is considered sufficient to silence possible opposition. Political conformity is applauded and political difference derided. The system thus puts a premium on cowardice in public life and obstructs the free course of opinion. Tact, agreeableness, flattery, 'the gift of the gab' and other such adventitious social qualities receive undue importance, truth, justice and reason recede into the background.

While the individual is thus silenced by the moral oppression of numbers, all those who exploit the public interest may manipulate the party as they please. The party becomes a tool for the use of private interests under cover of serving the public weal; elections to the Legislature, which it conducts, while ostensibly national, really turn on selfish interests. That is why it is said of the House of Representatives in the U S A that it represents every interest except the public interest! Corruption becomes a fine art and incidentally drives the finer sort of men away from politics. All this criticism means that the party is in effect a *faction*, it aims at securing personal and sectional benefits rather than at carrying out a programme of public policy. Alexander Pope's definition of party as 'the madness of the many for the gain of the few' is seen to be more realistic than its broader and more well-known formulation by Burke<sup>1</sup> in terms of national interest.

### *A non-party democracy*

Doubtless it was some such realization as this that led Rousseau to declare that any community in which parties existed was incapable of a true common will. A non-party democracy is therefore hailed by thinkers (both in the West and in the East) as the only remedy which will make representation more real and public life more honest. It has the support of America's first and greatest President. In his farewell address, Washington warned the Americans against the party spirit. The alternating domination of one faction over another, sharpened by the spirit of revenge natural to party dissension which in different ages and countries has perpetuated the most horrid enormities, is itself a frightful despotism.

'The disorders and miseries gradually incline the minds of

<sup>1</sup> Cited at the beginning of this section



men to seek security and repose in the absolute power of an individual ; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this despotism to the purpose of his own elevation on the ruins of public liberty. A fire not to be quenched, it demands a uniform vigilance to prevent its burning into a flame, lest, instead of warming, it should consume'

Attractive as a non-party democracy would appear to be, we suggest it is not practicable, even if it were desirable. If we were writing on a clean slate, it might perhaps be possible by means of a constitutional provision to prohibit party organization and party funds, but we have to deal with States where parties have come to stay. There is the initial difficulty—who is to bell the cat? If a Government in power (itself a party government) prohibits parties, will it apply the rule to the party from which it is chosen? If it does not, the road to one-party dictatorship is clear—a possibility with which one has to reckon in this imperfect world.

Further, the desirability of abolishing parties is open to question, for, in spite of their defects, they perform, as we have seen, certain essential functions. In a non-party democracy, the only means for the education of the electorate are the speeches of independent candidates, discussions in the Legislature, and agitation in the press. But without the association and discipline provided by the parties, these are likely to lack a sense of unity, responsibility, and continuity. Politics will lose its 'colour' and interest. No Government in power will be able to reckon in advance the support which it can normally command, and therefore be bold enough to cope adequately with its problems. These are serious defects which a governmental system can have, and would have to be met before the non-party system could be adopted.

It is better, then, frankly to recognize the existence of parties and to regulate them. More stringent laws to root out corruption and fraud in making up the party roll and in the conduct of business at party meetings and for the prevention of bribery and undue influence at elections may go some way to improve matters. The more active participation by upright and public-spirited citizens in party politics is essential. The more they keep out of them the more do they help to increase the evils which they

## §7] TWO-PARTY V MULTIPLE-PARTY SYSTEM

hate Further, the rigidity of parties in the Legislature has to be lessened by the provision of greater opportunities for the 'free' vote of members Finally, we must rely on the existence of a mobile body of public opinion, 'owing no permanent allegiance to any party, and therefore able, by its instinctive reaction against extravagant movements on one side or the other, to keep the vessel on an even keel'

## §7 THE TWO-PARTY V MULTIPLE-PARTY SYSTEM

Granted parties are tolerated, the question arises as to which system is preferable, the two-party or the multiple-party?

The multiple-party, or group-system as it is sometimes known, has some advantages It reflects perhaps more accurately than the two-party system the way in which the popular mind is actually divided And further, where parties are numerous there is likely to be less of the uncritical sentiment of loyalty to party, less probability that their members will regard all questions habitually and systematically from a party point of view

But, nevertheless, if a choice were possible, the two-party system is preferable to the multiple-party (i) It gives the necessary strength and stability which enable the Government to attempt great measures Long-term planning of policy can be successfully attempted only by a Government which is certain of a reasonably long period in office, that certainty can be provided, if at all, only under a dual party system (ii) The multiple-party system not only enfeebles the Executive, but gives a disproportionate power to self-seeking minorities, it turns important branches of legislation into class bribery and thus lowers the tone of public life (iii) The dual party system leads further to a more regular, systematic, and sober criticism of the Government than is likely under the group system The object of the Opposition being 'to get in', it is the business of its leaders to scrutinize the measures of the ministry carefully in order to expose all their weak points. At the same time there are strong inducements for them to abstain from attacking measures which are wisely chosen, because they expect to come to power and the blow may recoil on themselves (iv) The superiority of a two-party system over a multiplicity of groups is to be found, above all, in the fact that it

provides the only method by which the people at the electoral period can directly choose its government.

‘It enables that government to drive its policy to the statute-book. It makes known and intelligible the results of its failure. It brings an alternative government into immediate being. The group-system always means that no government can be formed until after the people has chosen the legislative assembly.’<sup>1</sup>

### §8 THE REFERENDUM AND THE INITIATIVE

So far the organization of the electorate has been considered; a word may be added about its powers. Its most important power, of course, is that of periodically electing its representatives to the Legislature. Can it be entrusted with any other functions in respect of legislation, administration, or judicial work?

In our survey of modern constitutions, two other ways in which the voters in some States—Australia, Switzerland (both in the Federal Government and in the Cantons), Germany, and the U.S.S.R.—share more directly in legislation have been noticed, viz. through the referendum and the initiative.<sup>2</sup> The referendum, it has been seen, is made use of in both its forms, the compulsory and the optional; it is applied to constitutional as well as to ordinary laws. The initiative is applied in some States to constitutional laws only, elsewhere to ordinary laws as well. What are the merits and defects of these methods of direct (popular) legislation?

Strictly from the point of view of democratic theory, the referendum and the initiative have some definite merits. They embody the principle of popular sovereignty better than the Legislature can; and, therefore, when a law has received the approval of the people themselves, it is likely to command more willing obedience than when it has only received the approval of the Legislature. The referendum ensures that laws opposed to the popular will are not passed, the initiative ensures that the people are not denied the laws they desire because of the unwillingness of the Legislature, controlled as it sometimes is by vested interests, to pass them. Indeed, the demand for the grant

<sup>1</sup> Laski, *A Grammar of Politics*, p. 314.

<sup>2</sup> In chs XIX, XX, XXI. These are also in use in Éire and in the states of America. The constitutions of several of the new States created after the Great War (1914-18)—Latvia, Estonia, Lithuania, Austria, and Czechoslovakia—also provide for some form of popular legislative activity. See Zurcher, *op. cit.*, p. 93.

of these rights is often made because of a belief among the people that the Legislature has failed more or less to translate the people's wishes into laws. The referendum is particularly useful as a check on legislative bodies, where, as in Switzerland, the Executive has no veto on the bills passed by them. Direct legislation, by means of the referendum and the initiative, is also of high value as a means of political education. In campaigns for the choice of legislators, personalities necessarily play some part; but in initiative and referendum campaigns there is the maximum opportunity to hear and decide solely on the basis of the facts and principles involved. The Swiss people have repeatedly shown ability to learn and to change their opinions upon questions submitted to them.<sup>1</sup>

While the referendum thus primarily serves as a check on the Legislature and as an agency of political education, it serves other purposes also. It is an excellent barometer of the political atmosphere, and a Legislature ought to welcome the opportunities it affords for discovering the real wishes of the people which it seeks to represent. It also helps to resolve deadlocks between the two chambers of the Legislature (as under the Australian constitution and under the Weimar constitution of Germany), or between the Legislature and the Executive (as under the constitutions of Czechoslovakia, Lithuania and the Free City of Danzig).<sup>2</sup> Thirdly, the referendum places before the voter a particular issue for consideration, making it easier for him to give his considered judgement, especially as contrasted with a general election campaign, in which he has, through his one vote, to elect his representative to the Legislature and simultaneously give his verdict on an omnibus party programme raising several issues.

A study of the working of the referendum and the initiative in those States where they have been in operation causes two reflections, however. First, the theoretical advantages referred to above have not been realized in all States, at any rate to the same extent. Second, direct legislation also has certain positive limitations which considerably lessen its value as a governmental institution. Regarding the first, it is sufficient to cite the authority of Bryce: after a survey of modern democracies he comes to the general conclusion that while the Swiss are well qualified

<sup>1</sup> Brooks, *The Government and Politics of Switzerland*, p. 163

<sup>2</sup> Zurcher, *op cit*, p. 98

by intelligence and knowledge of public affairs and their conservative nature to profit by the referendum and the initiative, it is more difficult to speak in the same terms of other States

That it has done little good, and perhaps done positive harm, would appear to be the prevalent opinion in America<sup>1</sup> The proportion of people who vote at referenda is less than at ordinary elections ; further, where the referendum is optional it is little resorted to These facts suggest the thought that people are more willing to choose between men than between laws , at any rate, the educative value of the referendum in practice is not as great as was expected Where the initiative exists, the methods employed to get the signatures of the people are not always fair , also, the bills and amendments are not skilfully drawn up

The referendum has five positive limitations (i) It tends to weaken, if not to paralyse, the sense of responsibility under which the Legislature does its work ; for the feeling might develop that the ultimate responsibility for any given measure rests not upon its members, but upon the voters , and this in turn is likely to react on the quality of membership of the Legislature It is true that fear of the popular veto may tend to make some legislators timid rather than reckless ,<sup>2</sup> but timidity, it may be argued, is equally undesirable in so far as it leads to conservatism or even reaction (ii) Experience shows that the proportion who actually vote at referenda is invariably less than fifty per cent of the qualified voters, for people develop 'electoral fatigue'. Thus the decision arrived at is invariably that of a minority, which is contrary to democratic principles The argument that since it is open to all to vote, failure to do so must be taken to mean approval, ignores the reasons why many people do not, in practice, turn up to vote If, to cure this defect, voting is made compulsory, it is found that, in sheer disgust, voters drop blank papers in the ballot box ! (iii) The number of specific questions capable of decision by mass voting is very small. What is significant in legislation is not the acceptance or rejection of a simple principle, say of protection or free trade, but its translation into terms of a statute with all its details, exceptions and delimitations 'The difficulty, in fact, which direct government involves is the final difficulty that it is by its

<sup>1</sup> H. Finner, *The Theory and Practice of Modern Government*, Vol II, p. 931

<sup>2</sup> Brooks, *op cit*, p. 162

nature far too crude an instrument to find room for the nice distinctions in the art of government'.<sup>1</sup> On many subjects, an opinion can be formed only after long and careful examination of the points at issue, the busy and ignorant voter hardly seems the person qualified or likely to make that examination. Indeed the referendum is an appeal from responsibility to irresponsibility, from knowledge to ignorance. This defect is much greater in respect of the initiative, for, unless under that system an examination of the initiative bills by the Legislature is made compulsory, it brings before the people bills that have not run the gauntlet of parliamentary criticism. (iv) Where the Executive is of the parliamentary type as in Britain, the referendum is likely to embarrass and confuse the Government.

'Unless there should occur a complete break with English political tradition, it is hardly conceivable that a ministry could with self-respect, or indeed with advantage to the country, remain in office after the rejection by the electorate of a government bill of first-rate importance. Could Mr Baldwin have retained office in 1924 if a scheme of Tariff Reform, declared by him to be essential to a solution of the problem of unemployment, had been rejected on referendum?'<sup>2</sup>

Incidentally, this explains why the referendum has not been introduced in the English system of government. (v) Direct legislation causes delay, and complicates the process of legislation.

Some of these defects may be overcome or lessened by the adoption of certain devices. When a bill is to be submitted to the people, the voter may be supplied in advance not only with the text of the bill, but a concise statement of its purpose and a summary of its contents. The initiative may be required to be drafted by an official (or recognized) draftsman, and it may have to be signed in the presence of a public authority. And before the opinion of the people is sought, the Legislature may in every case be given an opportunity to discuss it, and, if necessary, to submit to the voters along with it a statement embodying its own views or even a counter-proposal. The small size of the electorate, the absence of wide divergences of economic and social interests and of party influences, the presence of literacy and of an independent opinion are conditions which facilitate successful popular legislation. Nevertheless, it is advis-

<sup>1</sup> Laski, *op cit*, p. 322

<sup>2</sup> Marriott, *The Mechanism of the Modern State*, Vol. I, p. 462

able to restrict its use, as far as possible, to simple and intelligible issues, concerning the fundamentals of the constitution, on which a direct expression of opinion by the electorate may be helpful and even desirable.

### §9 THE PLEBISCITE AND THE RECALL

Two other political devices call for mention in this context as being connected with the powers of the electorate on legislation and other matters of political importance. They are the plebiscite and the recall

The plebiscite, like the referendum, is a vote of the people on a matter referred to them, but unlike it, it is a vote on some important public question (rather than on a law). The political destiny of a State or part of a State or of a national minority are points on which plebiscites are taken. For example, a plebiscite was taken in 1935 in respect of the Saar in order to decide whether it should be returned to Germany. Canada recently<sup>1</sup> took a plebiscite on the issue of conscription for overseas service

The recall means the 'calling back' of elected legislators, executive officers or judges before the expiration of the period for which they were elected, followed by the election of others to fill the places left vacant. This device is prevalent in many American states. In the state of Oregon, for instance, it is provided that when a prescribed percentage of electors in any electoral area have signed a petition demanding a vote on the dismissal of an elected official, a popular vote shall be held on the matter (unless the official immediately resigns), and if the vote by a majority goes against the official, he shall be dismissed and a new election shall be held for the choice of his successor for the unexpired residue of his term.<sup>2</sup> This procedure has been adopted by other American states and has been frequently successful,<sup>3</sup> though very rarely in the case of members of the Legislature. Judges may be recalled by popular vote in six states, even judicial decisions may be reversed by popular vote in the state of Colorado

Outside the American states, there used to be provision for executive recall in Germany and Latvia. In Germany, the

<sup>1</sup> 27 April 1942

<sup>2</sup> Bryce, *Modern Democracies*, Vol II, p 162

<sup>3</sup> Strong, *op cit*, p 291

Reichstag could, by a two-thirds majority vote, bring before the electorate a proposal to recall the President. The Latvian President could be recalled by a specified majority of the Legislature. The constitutions of twelve German states contained provision for the recall of the Legislature or of the Executive, on a petition initiated by the electorate. In eight Swiss cantons, the people may, by a specified majority, demand the dissolution and re-election of the cantonal Legislature before the expiration of its term<sup>1</sup>

There can be no two opinions on the undesirability of the recall. It is wrong and mischievous. It asks too much of the average voter. If it is applied to the legislator there is a real danger of turning him into a mere mouthpiece of the voters' mandate, contrary to the sound principles laid down by Burke. If it is applied to the executive official, it tends to make him timid and corrupt. If it is applied to the judge (or to his decisions) it destroys the independence which is so necessary for the proper administration of justice.

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<sup>1</sup> Here the recall is usually applicable to the legislative body as a whole, and in a few instances to the members of either House from a single electoral district. See Brooks, *op cit*, p. 322



## CHAPTER XXVIII

# THE LEGISLATURE

### §1 THE FUNCTION OF THE LEGISLATURE

Legislatures in modern States, we have seen, do not all perform identical functions. Everywhere they pass laws, determine the ways of raising and spending public revenue, and discuss matters of public importance. Almost everywhere they have some part in the process of amending the constitution. They control the Executive in States where, as in Britain and France, the Executive is a parliamentary one. Some Legislatures, as in Switzerland and France, have elective functions. The upper Houses of several States (Britain, for instance) have judicial functions, both original and appellate. Those of France and the United States of America share in executive functions: the consent of the Senate is necessary in France for the dissolution of the lower House, in the U.S.A. for the appointment of officers and the making of treaties. This variety can, of course, be explained only by the circumstances in which constitutions were framed and have developed in the respective countries. The judicial function of the House of Lords, for instance, is a historical survival, and is not of much significance, for, as we have seen, that function is in effect performed by the Lords of Appeal and the Lord Chancellor. The functions of the Senate of the United States of America in respect of appointments and treaties must be explained, partly at any rate, by the desire of the states on the establishment of the Federation to have some check on the new federal authority (to whom they were surrendering large powers), the Senate, being considered the guardian of state rights, was vested with these powers.

Practice apart, the question may be raised as to what is the proper function of a legislative body. We may discuss this under four heads: legislation, administration, finance, and the ventilation of grievances.

(1) *Legislation* The first important function of a Legislature is, of course, to enact laws. The part that a legislative body

## §1 ] THE FUNCTION OF THE LEGISLATURE

(which is normally very large in size) should have must, however, be correctly grasped. That great authority, J. S. Mill, has said a numerous representative assembly is not fitted for the direct business of legislation, which is skilled work demanding study and experience. It is not competent to do the work itself but it can cause it to be done, it is competent to determine to whom or to what sort of people this work shall be confided, and to give or withhold the national sanction when it has been done.

‘Every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions, and the law when made should be capable of fitting into a consistent whole with the previously existing laws. It is impossible that these conditions should be in any degree fulfilled when laws are voted clause by clause.’<sup>1</sup>

The mere time necessarily occupied in getting through bills renders Parliament incapable of passing any except on broad principles. Mill himself suggested that the duty of making the laws should be entrusted to a small body of experts, a Commission of Legislation, not exceeding in number the members of a cabinet. No one would wish, he added, that this body should of itself have any power to *enact* laws, the Commission would only embody the element of intelligence in their construction, Parliament would represent that of will. Indeed, it should be a rule that no measure can become law, until expressly sanctioned by Parliament. Technical knowledge needs to be tempered by the representatives’ knowledge of social needs and the desires of the public. While Mill’s specific suggestion has not anywhere been adopted, it is significant that the responsibility for the initiation of new legislation in most parliamentary bodies is vested in the Executive, which avails itself of the advice of experts and of advisory bodies representing special interests.

(ii) *Administration* A popular assembly is still less fitted to administer or to dictate in detail to those who have the charge of administration. Here again its proper office is that of superintendence and check—to throw the light of publicity on the Government’s acts, to censure them if found condemnable, and, if the men who compose the Government abuse their trust or fulfil it in a manner which conflicts with the deliberate sense of

<sup>1</sup> Mill, *Representative Government*, ch. V

the nation, to expel them from office, and virtually appoint their successors <sup>1</sup>

(iii) *Finance* In matters of finance, it should be a rule that public money cannot be raised or spent without Parliament's sanction; but proposals for raising and spending money must come from the Executive. Further, the right of private members to propose new items of expenditure should be restricted, because this puts a premium upon particular interests instead of on the general interest, or upon the immediately apparent instead of the more essential

(iv) *The ventilation of grievances* Finally, a Legislature is a useful organ of public opinion, 'the nation's Committee of Grievances, and its Congress of Opinions', a place where every interest and shade of opinion can have its cause presented. This is a most important function in a democracy, which has been well described as a government controlled by public opinion.

## §2 BICAMERALISM

Most modern constitutions provide for a Legislature of two chambers, the lower and the upper. Exceptions are Greece, Turkey, four Baltic States (Finland, Estonia, Latvia and Lithuania), two Balkan States (Yugoslavia and Bulgaria), some Canadian provinces,<sup>2</sup> some Swiss cantons,<sup>3</sup> and some Indian provinces.<sup>4</sup>

The more important arguments advanced in favour of a second chamber are the following.

(i) It is a safeguard against the despotism of a single chamber. Lecky and J S Mill are strong exponents of this view. Of all the forms of government that are possible among mankind, says the former, there is none which is likely to be worse than the government of a single omnipotent democratic chamber, it is at least as much susceptible as an individual despot to the temptations that grow out of the possession of uncontrolled power, and it is likely to act with much less sense of responsibility and much less real deliberation. Mill expressed himself equally strongly. the same reason, he said, which induced the Romans to have two consuls makes it desirable that there should be two

<sup>1</sup> *ibid*

<sup>2</sup> All except Quebec and Nova Scotia

<sup>3</sup> With the exception of six cantons, each has a unicameral legislature. See Brooks, *The Government and Politics of Switzerland*, p 313

<sup>4</sup> The Central Provinces, the North-West Frontier Province, Orissa, the Punjab, and Sind

§2] chambers, so that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.

(ii) A second chamber serves as a check upon hasty and ill-considered legislation. An elected Legislative Assembly, it is argued, may be moved by strong passions and excitements, a second chamber, constituted differently and if possible with superior or supplementary intellectual qualifications, helps to restrain such tendencies and compels a careful, sober consideration of legislative projects. It is, as it were, an appeal from 'Philip drunk' to 'Philip sober'. It interposes a necessary delay between the introduction and the final passing of a measure, and subjects it to revision which may introduce improvements in form or substance.

(iii) It helps to provide adequate representation of the aristocratic element of the community. The lower House, elected as it is on a wide suffrage, is bound to reflect the views of the masses, the upper House serves to balance this undue preponderance, and minimizes the danger of class legislation.

(iv) The constitution of a second chamber is the best way of providing adequate representation to certain 'interests' in a country, which need representation but which, for want of proper organization or other reasons, may not get such representation in the lower House. Labour, Women, Landlords and Chambers of Commerce are instances in India of these special interests.

(v) A second chamber makes it possible for people of political and administrative experience and ability (who for reasons of age, finance, or health are not likely to try to enter the lower House through the arduous process of electioneering) to be brought into public life and made available for the service of the State.

(vi) In federal States, the second chamber affords an opportunity for giving representation to the component units of the federation as *units*, the lower House being constituted on a population basis.

(vii) And, lastly, it is argued, particularly by J. A. R. Marriott, that the experience of history has been in favour of two chambers. No major State, whatever its form of government, whether federal or unitary, monarchical or republican, presidential or parliamentary, constitutionally flexible or rigid, has been

willing to dispense with a second chamber And even those States, like England, which tried the unicameral experiment during a period of social disorder, went back to the orthodox pattern after a time It is not wise to disregard the lesson of history.

Bicameralism has not, however, had the unanimous support of political thinkers. At least from the time of the Abbé Siéyès, the dilemma has been posed that if a second chamber dissents from the first, it is mischievous, if it agrees with it, it is superfluous<sup>1</sup> Further, the opponents of bicameralism suggest that it is unnecessary to have a second legislative chamber, with its attendant delay and expense, as a safeguard against the despotism of a majority in a single chamber Other safeguards exist and are possible, e.g. the suspensive veto of the Executive, a second vote in the same chamber after an interval, and so on In any case, as Mill rightly said,<sup>2</sup> the check 'which a second chamber can apply to a democracy otherwise unchecked' is not of much value, because few will then be disposed to listen to its opinion Again, legislation, it is argued, is not so hasty or ill-considered as is often made out; 'almost any measure that is enacted becomes law as the result of a long process of discussion and analysis'; the committee system is especially useful in securing the necessary care in legislation. Finally, the difficulties in the construction of a second chamber in such a way that it will not compete with the first but will at the same time be constituted differently from it and will attract talent are too great to be overcome Even the additional argument, applied to federal States, that a second chamber embodies the federal principle, is to be discounted, for experience shows that members of the second chamber often vote on party, rather than state, lines.

### §3 THE UPPER HOUSE

Disregarding the pros and cons and granting that it is decided to have a second chamber in a State, what are the considerations to be kept in view in constructing one—in respect of its composition, duration, and powers?

<sup>1</sup> For a modern version of the dilemma, see Laski, *A Grammar of Politics*, p. 331. The first part of the dilemma assumes, it may be added, that the will of the people is reflected in the lower House; and that an upper House, which is nominated or hereditary, has no authority to oppose it.

<sup>2</sup> *Representative Government*, ch. XIII.

The main principle is that it should be differently composed from the first so that legislative measures may receive consideration a second time by a body different in character from a primary representative Assembly, if possible with superior or supplementary intellectual qualifications, otherwise there will be duplication. This differentiation is usually brought about in the following ways.

(i) *In the method of choice of members* The lower House is generally a directly elected body, the upper House is, in the main, a hereditary body, as in Britain, or a nominated body, as in Canada and Italy, or an indirectly elected one, as in France, or a partly nominated and partly (directly) elected body, as in India<sup>1</sup>. The objections to the hereditary principle are obvious: the qualities required for a legislator are not handed down from father to son, a hereditary body is, besides, an anachronism in a democratic age. Nomination has one merit: it enables men of character and ability who may not desire to contest elections to be made available for the service of the community (through nomination). A most serious objection to it is that the nomination is certain to be abused by being made on party lines, and, further, a nominated upper House, not being representative, may not command the confidence of the people. Indirect election gives some representative character to the body so elected, and presumably gives the choice of the legislators to people more competent than the primary voters, but it provides greater opportunity for corruption than direct election.

(ii) *In the tenure of membership* In the United States of America, members of the lower House are elected for two years, but members of the upper House for six years; in France, the corresponding periods are four and nine years. Besides, as we have seen, the principle of partial renewal is applied to members of the upper House, one-third, for instance, retiring every two years in the United States of America.

(iii) *In qualifications for membership* In the United States of America for membership of the House of Representatives, the age qualification is 25, but for membership of the Senate, it is 30. The corresponding requirements in France are 25 and 40. Differentiation may also be made by prescribing a property

<sup>1</sup> In the U S A, the U S S R, Australia, and Switzerland (almost wholly), the upper House is also directly elected, but differentiations are made in other ways.

or educational qualification, as is done for membership of the Indian Council of State

The best method of constructing the upper House is, perhaps, the one recommended by Sidgwick in his *Elements of Politics*,<sup>1</sup> viz a combination of nomination and indirect election. This gives it a differential character, makes it a partially representative body, and provides an opportunity for the nomination of the best men. A small body is preferable to a large one, two hundred ought to be the upper limit. The upper House so constituted may be given a fairly long tenure, say six years, it could also be renewed partially, say one-third every two years. Its powers should be on the lines recommended by the Bryce Conference Committee, which we have already cited, the essential idea being that the upper House should not obstruct the will of the lower House, but should be helpful in revising the laws passed by the lower. Further, it must have power to interpose such delay in the passing of a bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.

#### §4 THE LOWER HOUSE

That the lower House should be elected by the people hardly needs special mention. The organization of the electorate and the methods of election and of voting (both in theory and practice) have been discussed elsewhere.<sup>2</sup> The size of the House is also a matter for careful consideration. The principles are clear enough: it should not be too large to make effective deliberation possible, it must not be too small to make the formation of reasonably small constituencies easy, for if the constituencies become very large, members cannot maintain effective contact with their electors. In fixing the actual number, the area of the State and the population must, of course, be taken into consideration, five hundred would be a reasonable maximum.<sup>3</sup> Regarding the tenure of the House, the principle is that it must

<sup>1</sup> pp 476-7. H. B. Lees-Smith in his *Second Chambers in Theory and Practice*, pp 216ff, recommends the Norwegian system, in which the second chamber is a small body elected by the first, and roughly proportionate to the composition of the latter. Laski also commends the scheme in *A Grammar of Politics*, pp 332-3.

<sup>2</sup> See above, chs XVI to XXII and XXVII.

<sup>3</sup> The size of lower Houses in modern States, it will be remembered, varies from 75 in Australia to 615 in Britain.

be sufficiently long to enable members to familiarize themselves with procedure and to settle down to useful work, a very short period may result in members losing touch with the electorate. Perhaps a period of not less than four years nor more than five is the best, subject to the qualification that the House may be dissolved earlier by the Executive when the electorate has to be consulted on an issue which was not placed before it at the general election. The functions of a body so constituted must be more or less the functions which we have discussed in §1 of this chapter. It must make the final decision in matters of legislation and finance, the initiative being with the Executive, and the revision, subject to the final sanction of the lower House, being left to the upper House. It should, besides, be the organ of public opinion on all matters of public importance. Above all, it must watch and control the Government, compelling it to justify all its acts before the Legislature and before the public, and 'if the men who compose the Government abuse their trust or fulfil it in a manner which conflicts with the deliberate sense of the nation', it must have power to expel them from office, and either expressly or virtually appoint their successors. This last function it can, of course, only perform efficiently where the Executive is a parliamentary one, where a non-parliamentary Executive prevails, its function in this regard must necessarily be secondary and indirect.

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## THE EXECUTIVE

## §1 ITS FUNCTIONS

The Executive is the second main branch of government. The term is used in a broad sense to indicate 'the aggregate or totality of all the functionaries and agencies which are concerned with the execution of the will of the State as that will has been formulated and expressed in terms of law'.<sup>1</sup> In this sense, it includes not only those (like the President in the U.S.A. and the cabinet in Britain) who exercise supreme control but also the host of subordinate officials, like policemen and clerks, who simply carry out orders. It is more common in political science to restrict the use of the term Executive to those whose primary duty is rather that of 'seeing that laws are enforced' than that of 'doing the things which the laws call for', the term 'the Civil Service' is used to connote all other executive officials taken together.

Our survey of constitutions indicates that the functions of the Executive are not everywhere, or at all times, identical. They vary according to the type of Executive (being greater in respect of legislation in countries having a parliamentary Executive than in those having a non-parliamentary Executive), and according to the prevailing conceptions regarding the sphere of the State (being greater in totalitarian than in liberal States). An outline of its more important functions may, however, be attempted under three headings.

(i) *Legislative* It has been noticed that while laws are everywhere passed by the Legislature, the Executive has some share, direct or indirect, in the process of legislation—recommending measures for its consideration, initiating bills, defending them in parliament, exercising a suspensive veto, etc. Besides, almost everywhere it has the power of delegated legislation, i.e. of issuing statutory orders and rules under the power vested in it by the Legislature. The power of summoning, proroguing and

<sup>1</sup> Garner, *Political Science and Government*, p. 677.

dissolving the Legislature (in countries where the constitution does not itself fix its tenure and date of meeting) is also invariably vested in the Executive

(ii) *Administrative* Three kinds<sup>1</sup> of administrative duties may be distinguished. The first is the direction and supervision of the execution of laws. To enable the Executive to perform this duty efficiently, it is vested with the power of appointing and removing the higher officials, directing their work, and exercising disciplinary control over them. In some States, as in the U S A, the appointments may be made by the Chief Executive only with the consent of one chamber of the Legislature. The second is the military power, this includes the supreme command of the army, navy and air force, and, in some States, the power to declare war.<sup>2</sup>

'The command and application of the public force to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature and require the exercise of qualities so peculiarly adapted to this department, that they have always been exclusively appropriated to it in every well-organized government on earth.'<sup>3</sup>

And the third is the power to represent the Government in its relations with other States, conduct negotiations with them, and conclude treaties. In some States, e.g. France and the U.S.A., some or all treaties require for their validity the consent of the Legislature, or one of its chambers.

(iii) *Judicial* In the main, this relates to the pardoning power vested in the Executive in almost every State (with or without limitations),<sup>4</sup> but it also includes in some countries, as in Britain, the quasi-judicial power of trying certain disputes between government officials and private citizens.<sup>5</sup>

## §2 TYPES OF EXECUTIVE

Our study of constitutions, past and present, shows that there have been many different types of Executive. The executive power was vested in two kings in Sparta, but the kings were so

<sup>1</sup> Some writers would prefer to call the three duties here listed together as 'administrative' by three separate names, 'administrative', 'military' and 'diplomatic'

<sup>2</sup> e.g. in Britain, in the U S A, Congress alone can declare war

<sup>3</sup> Kent, *Commentaries*, Vol I, p. 283

<sup>4</sup> See above, ch. XVI, §3

<sup>5</sup> See above, ch. XVI, §13

far from being kings in the ordinary sense that they were not even chief magistrates. The real Executive was a Council, the College of Ephors.<sup>1</sup> Rome in republican days vested the executive power in two consuls of equal power, but there were other magistrates also who 'though inferior in rank to the consuls, were still strictly co-ordinate with them, and were in no sense their agents or delegates'.<sup>2</sup> In the seventeenth-century European States the executive power was vested in one single hereditary monarch. In modern Britain, the real executive power is vested in a cabinet chosen from Parliament, in the U.S.A., in a President elected by an electoral college, in Switzerland, in a Federal Council of seven elected by the Legislature. In a short survey, like this, it is impossible to compare and contrast all types with one another, but two distinctions are pronounced in modern democratic States, and must be discussed.

### *Single and plural Executives*

The primary difference between the single and the plural Executive (illustrated respectively by the President of the U.S.A. and the Federal Council of Switzerland) is that in the former, the final control rests with one individual, whereas in the latter, it rests with a Council. The President of the U.S.A. has his ministers, but they are strictly *his* ministers, named by him and dependent on him, they are his advisers and agents, not his colleagues.<sup>3</sup> The position of the President of the Swiss Confederation, on the other hand, as has been noticed earlier,<sup>4</sup> is wholly different. He is simply the chairman of the Federal Council and exercises the usual powers of a chairman. The other members of that Council are his colleagues, not merely his agents or advisers, executive acts are the acts of the Council as a body, not of the President personally.<sup>5</sup>

The single Executive has one clear advantage. It secures the unity, singleness of purpose, energy and promptness of decision so necessary for the success of an Executive. This consideration is of particular importance at grave crises of national existence, when unity of control is absolutely essential. A collegial Executive, on the other hand, impairs unity of control by dividing

<sup>1</sup> E. A. Freeman, *Historical Essays*, Essay XII.

<sup>2</sup> *ibid.*

<sup>3</sup> See above, ch. XX, §3.

<sup>4</sup> *ibid.*

<sup>5</sup> Freeman, *op. cit.*

responsibility What a Board does, says J S Mill,<sup>1</sup> is the act of nobody, for nobody can be made to answer for it.

A plural Executive has, however, its compensating advantages It is a maxim of experience that in a multitude of counsellors there is wisdom<sup>2</sup> A collegial Executive is safer than a single one It renders more difficult the encroachment of the Executive on the liberties of the people in general While it hinders the commonwealth from making the most of a great man, it prevents it from being dragged through the dirt by a small man<sup>3</sup>

'The presidency of Washington and the presidency of Pierce are in Switzerland alike impossible America, with her personal chief, runs a risk which Switzerland avoids As in all cases of risk, the more adventurous State sometimes reaps for itself advantages, and sometimes brings on itself evil, from both of which its less daring fellow is equally cut off. It may be that each system better suits the position of the nation which has adopted it'<sup>4</sup>

### *Parliamentary and non-parliamentary Executives*<sup>5</sup> *Just*

The second distinction is between an Executive (as in Britain) chosen from Parliament and holding office only so long as it commands the confidence of that Parliament, and another (as in the USA) chosen independently of the Legislature and holding office for a fixed term

The parliamentary Executive has several advantages (1) It ensures harmony and co-operation between the Executive and the Legislature which make for efficient legislation The Executive's experience of the administrative process is useful in making the laws passed by the Legislature more realistic than they are otherwise likely to be. In Laski's expressive phrase, Congress in America legislates in a vacuum The divorce of the Executive from the Legislature is 'the forcible disjunction of things naturally connected', it is indeed injurious to both

'The Executive is crippled by not getting the laws it needs, and the Legislature is spoiled by having to act without responsibility the Executive becomes unfit for its name, since it cannot

<sup>1</sup> *Representative Government*, ch XIV

<sup>2</sup> *ibid*

<sup>3</sup> Freeman, *op cit*

<sup>4</sup> *ibid*

<sup>5</sup> The parliamentary Executive is also sometimes called the cabinet type of Executive, the non-parliamentary is called the fixed or presidential type For examples and characteristics of the parliamentary type, see chs XVI, XVII, XIX, for the non-parliamentary, see ch XVIII

execute what it decides on, the Legislature is demoralized by liberty, by taking decisions of which others (and not itself) will suffer the effects' <sup>1</sup>

(ii) It contributes to the efficiency of the administration by bringing the ministry into constant contact with the Opposition. The Opposition, eager 'to get in', keeps the ministry up to a high pitch of alertness through questions and vigorous criticism. (iii) It makes for responsibility to popular will. An Executive, liable to lose the confidence of Parliament as the result of the exercise of arbitrary power, is careful not to be autocratic. By its very nature, it is always induced to adopt a policy which has the support of public opinion. Even so 'autocratic' an Executive as the British cabinet always has its finger on the pulse of the House of Commons and of the larger public outside.<sup>2</sup> (iv) It provides a simple method whereby persons fitted to be members of an Executive may make known their ability; <sup>3</sup> indeed, according to Laski there is no alternative method that in any degree approaches it.

But the parliamentary Executive has its defects. (i) Its tenure is uncertain, being liable to be upset at any moment by a breeze of popular disfavour, 'if the dominant party in the representative chamber is either small or wanting in coherence'. Cabinet government worked successfully in Britain because of the existence of two, and only two, well-organized and powerful political parties, one of which was willing and able to take up the work of government when the other laid it down, when three parties so divided the House that no one party was able to command a majority (as happened between 1923 and 1929), it did not work well. In most other countries which have adopted the cabinet system of government, two strong parties have not developed, however. French experience in this regard is typical. Ministries there are shortlived and uncertain of their period of office, the uncertainty renders it difficult for them to adopt a farsighted and consistent policy. Under other conditions, where one party dominates the House, there is quite a different danger, which we have noticed in connexion with the British cabinet. <sup>4</sup> there is a constant temptation to members to vote, not the best way, but

<sup>1</sup> Bagehot, *The English Constitution*, ch. I

<sup>2</sup> See above, ch. XVI, §9

<sup>3</sup> See above, ch. XVI, §8, Laski, *A Grammar of Politics*, pp. 299-300

<sup>4</sup> See above, ch. XVI, §9

the way that will help to keep in or turn out the ministry, and this makes the cabinet autocratic (ii) Ministers are liable to be distracted from their executive duties by their parliamentary work. This is especially true in countries like France, where the ministry has no stable majority and, further, is unwilling to propose measures, however salutary, that are likely to be unpopular, but is merely anxious to propose measures 'whose chief merit is their vote-catching quality' (iii) The choice of ministers in this system is limited to members of the dominant party in Parliament, it is quite possible that they will not possess general administrative ability, still less the special knowledge required for particular departments.

By contrast, the great advantages of a presidential system of government are its stability and freedom from control by a fickle legislative majority. Thus the President of the U.S.A. is elected for a fixed term, and except in the case of some definite crime being judicially proved against him, he cannot be constitutionally removed before the end of that term. He is free to pursue a reasonably continuous and consistent policy, and, with nothing either to gain or fear from Congress, is free to think only of the welfare of the people. Moreover, according to J. A. R. Marriott, there is a real gain in efficiency of administration because ministers are not distracted by the necessity of constant attendance in the Legislature, and in efficiency of legislation because the minds of legislators are concentrated upon their special functions.<sup>1</sup>

These advantages, however, are gained at the cost of too great an isolation of the executive and legislative branches from each other, with all the attendant disadvantages noticed above and the possibility of deadlocks between two branches of government, which ought, if possible, to be avoided. In the U.S.A., if Congress and the President do not agree, neither party has any means of getting rid of the other. The President cannot dissolve Congress and he is in no way called on to resign his own office. A similar situation would be met in Britain either by the resignation of the ministry or by the dissolution of the House of Commons.

It may be, as Freeman suggests,<sup>2</sup> that each system is suited to

<sup>1</sup> *The Mechanism of the Modern State*, Vol II, pp 113-14. Marriott, however, seems to discount the value of the increasing part that the American Executive plays in legislation. See above, ch XVIII, §3. <sup>2</sup> *op cit*

the circumstances of the country where it prevails, for the great lesson of political history is that no kind of government worthy to be called government is universally good or bad in itself. Nevertheless, it is impossible to withhold admiration for the Swiss system which has the merits of both types of Executive and avoids the defects of both

### §3 THE EXECUTIVE TO SUIT INDIAN CONDITIONS

Two broad principles emerge from a comparison of the two types of Executive (i) The separation of the Executive from the Legislature is undesirable, as it supplies to the latter a valuable element of leadership. The initiative in law-making is best taken by the Executive (ii) In order to perform its functions efficiently, an Executive should have fair unity of outlook and stability of tenure. At the same time, its actions should have the general approval of the nation. In America this responsibility is ensured by having the chief Executive elected by the people, in Britain, by having it chosen from and responsible to the Legislature. The Executive recommended for India, if it is to be satisfactory, must be based on these principles, while at the same time it must be suited to her own social environment.

The adoption of the British type of parliamentary Executive in India, chosen from the party which commands a majority in the Legislature, is attended by certain difficulties. That system demands, for its successful working, an agreement on fundamentals, a spirit of accommodation, the existence of *political* parties and of a middle opinion which India has yet to develop on a large scale. Here, it is urged, the minority communities do not have confidence in the sense of fairness of the majority, therefore a system of separate electorates has been sanctioned for elections to the Legislature. A composite Legislature involves a composite cabinet containing representatives chosen from, and enjoying the confidence of, the various communities and parties, only then will the minorities have the confidence that the laws passed by the Legislature are carried out justly.

If a composite cabinet<sup>1</sup> is decided upon, how exactly is it to be chosen? Should it find statutory recognition? There is no

<sup>1</sup> A composite cabinet is more or less the same thing as a coalition cabinet, though the term 'coalition' is used to designate a ministry drawn from more than one party, and its members need not be chosen from all parties.

§3] *THE EXECUTIVE TO SUIT INDIAN CONDITIONS*  
 agreement on these matters among the advocates of the system. One proposal is that the leader of the majority party should be compelled by law to include in his cabinet members enjoying the confidence of other groups in the Legislature and appointed on the recommendation of the legislative groups concerned. Another suggestion, mainly modelled on the Swiss Federal Council, is outlined in *The Indian Journal of Political Science* <sup>1</sup>

The executive authority of a province would be vested in a Governor who would be required to act on the advice of a Council of Ministers. There would be no statutory limit as to the number of members in the Council, but the Governor would assign the appropriate number of seats in the Council to each party in proportion to its strength in the Legislature. Unattached members may also be given representation on the same lines, if necessary. Members of the Council would be returned after election by the Legislature as a whole, and the Council, when formed, would elect its own leader who might be called the prime minister. The ministry should have a fixed tenure of three to four years, which should also be the tenure of the Legislature. Ministers would continue to be members of the Legislature and take an active part in its deliberations. The experience gained in working this scheme in the provinces might then be utilized in devising a suitable type of Executive for the Centre.

#### *Defects and merits*

The composite cabinet quite clearly has some defects. First, it is essentially a weak government. The history of French coalition cabinets is sufficient warning in this regard. A ministry consisting of all parties in the Legislature, large or small, may be so thoroughly divided within itself that it cannot work out any long-term programme and may even fail to maintain reasonable standards of efficiency and order. It provides opportunities for continuous irritation and disagreement. Second, under this system of Executive, the Opposition, if any, is also likely to be ineffective. The experience of the National Government in Britain from 1931 (the nearest analogy to what in this country would be called composite cabinets) is instructive in this respect. 'That Government', says a careful observer,<sup>2</sup> 'had the lie in the

<sup>1</sup> Vol III, p 504, by N S Pardasani

<sup>2</sup> A L Rowse in *The Political Quarterly*, Vol XI, p 251



soul from the beginning. It was founded in fraud and lived by fraud. . . The very idea of a National Government was thus to undermine and to destroy the effective working of parliamentary democracy in which the Government was kept up to the mark by a strong Opposition that could be called upon to replace it if things went wrong' Thirdly, it may lead to an undesirable increase in the number of groups in the Legislature, for if every party is to have statutory representation in the Executive, it is surely an inducement to ambitious men to form new parties.

Nevertheless, the system of composite cabinets is well worth trying. It may give minorities greater confidence in the majority. And if a fixed tenure of office is also stipulated, this will conduce to that stability of administration which is so desirable in the interests of efficiency. One essential pre-requisite for its success, however, is the introduction of joint electorates for the Legislature, as in Switzerland. They stimulate the will to work together in a spirit of give and take, not only among the members of the Legislature but among the members of the cabinet.

#### §4 THE ORGANIZATION OF THE CIVIL SERVICE

We have earlier distinguished the Civil Service from the chief Executive, the duty of the former being to obey the orders of the latter. Briefly, it is 'a professional body of officials, permanent, paid and skilled'.<sup>1</sup> There was a time in history, as we have noticed with reference to Athens, when civil servants were not *permanent* officials, and were recruited for the most part from ordinary citizens, with no specialized training. That is a state of things which can hardly be revived, for the problems of modern government are very complex, requiring for their efficient solution a body of men who are trained for their job and who take to government service as a vocation for life.

The importance of the Civil Service has grown with the increased activity of the State. The modern State, we have noticed earlier,<sup>2</sup> is not a police State, but a social service State, its functions have, therefore, increased enormously. As the scope of State activity widens, the Civil Service grows not only in numbers<sup>3</sup>

<sup>1</sup> *Finer, The Theory and Practice of Modern Government*, Vol II, p 1163

<sup>2</sup> See above, p 111.

<sup>3</sup> From statistics given by *Finer*, op cit, pp 1167 and 1182, it is seen that in Great Britain in 1929, the Civil Service consisted of 1,417,432 people out of a

#### §4] *THE ORGANIZATION OF THE CIVIL SERVICE*

but in power, for every extension of the area of State activity increases the points at which officials and citizens come into contact with each other. The greater the prohibitions and restrictions by Government on personal conduct, the greater, inevitably, the power of the Civil Service. The growth of delegated legislation and administrative justice, noticed earlier, must also be reckoned among the causes of the increasing importance of the Civil Service, for they increase the area of discretion vested in that service.

Three or four principles have gradually been established in the past hundred years regarding the organization of the Civil Service.

(1) The political Executive should have little control over the appointment of permanent officials because that might lead to party patronage, favouritism and insecurity of service. Men of ability and character will not be tempted to join the Service when no guarantee of continuous livelihood exists. Further, appointment by the political Executive may lead to corruption. The time and mind of ministers will be devoted to the rewarding of the followers of a party and to the interviewing of an endless number of candidates and those who come to plead on their behalf, rather than to the formulation of policies for the promotion of social good and their efficient administration. It is now recognized that to avoid these evils, members of the public Services must be appointed by persons other than those in the cabinet and under rules which reduce to a minimum the chances of personal favouritism. A Public Service Commission, with members holding office during good behaviour, is entrusted with the duty of recruiting men to the Service by open competition (supplemented by interviews in certain cases). The fundamental principles in the conduct of the Service thus constituted are permanence in office and the dissociation of tenure of office from the changes of government caused by the cabinet system. Once a candidate has been admitted to the Service, granted efficiency and good behaviour, he should be certain of keeping his place until the age of retirement. The Executive should have the right of dismissal, to be exercised only in cases of incompetence.

total population of 44·7 millions, whereas in 1881, it consisted only of 81,000 out of 29·7 millions. In Germany, in 1928, it consisted of 1,187,925, out of a total population of 64·4 millions. In 1881, 452,000 out of 45·4 millions.

or neglect of duty, and never for political reasons or to make room for favourites

(ii) Promotion must be on the basis of seniority tempered by factors of efficiency

(iii) Members of the Civil Service must abstain from party politics, and loyally carry out the orders of their chief, whichever party be in power, in so far as they are within the limits of the law. They must, further, observe strict official secrecy

(iv) The minister takes the responsibility for the action of his subordinates. It is a convention that no mention should be made in Parliament of a minister's permanent subordinates, either by way of praise or criticism, and no minister should take shelter behind the staff of his department

In India, a further principle is now recognized as essential in the organization of the Civil Service, viz communal representation. Thus the Government of India have laid down the rule that 25% of all vacancies to be filled by direct recruitment of Indians will be reserved for Muslims and  $8\frac{1}{3}\%$  for other minority communities. Should Muslims and other minorities obtain less than their prescribed percentages in open competition, these percentages will be secured to them by means of nomination. To help the backward communities further, lower qualifications in respect of age and education are prescribed. Such discrimination in favour of minorities is not followed in European countries. The clause usually inserted in the constitutions of these countries is to the effect that differences of race, language or religion shall not prejudice any national in admission to public employment.

The *raison d'être* of communal representation in the Services is the unequal cultural development of the communities in the State. It is based on the view that the efficiency of the public services is a function not merely of the qualifications of the entrants thereto but of the social harmony in the body politic they serve. Such harmony, it is argued, can only be secured by the fair representation of the various communities in the Services through reservation and the like. The principle, however, works under two healthy safeguards, which it will be unwise to depart from: in order to secure a fair degree of (if not the maximum) efficiency, a minimum qualification is imposed; and communal representation should not be taken into account in making pro-

§5] WHY THE POWER OF THE EXECUTIVE HAS GROWN

motions. If a senior found a junior promoted over him merely because he belonged to another community, there would be discontent within the Service. Such treatment would be going a long way on the road towards dividing the Service by communities, and 'a body which is divided against itself cannot have that *loyalty* and *esprit de corps* which are so vital in public service.'

## §5 WHY THE POWER OF THE EXECUTIVE HAS GROWN

Before we pass on to the Judiciary, mention must be made of a remarkable trend in modern politics—the growth in the power of the Executive at the expense of the Legislature. This development is true not only of government in totalitarian States but also in democratic States. What are the reasons for this new development?

It might, indeed, be expected that the Legislature should generally be 'the great overruling power in every free community', for the will of the State must be expressed before it can be enforced, and that will is expressed by the Legislature. The Legislature has power over the purse, it has power to regulate matters the power over which has not been conferred on other departments, where a parliamentary Executive exists, the tenure of the Executive is controlled by the Legislature, and the importance of the legislative function has increased in proportion to the increase of collectivist legislation.

But in practice, the Executive tends to overshadow the Legislature for several reasons. (i) Modern executive business is concerned not only with the execution of laws, but also in many cases with the initiation of bills to be sanctioned by the Legislature. (ii) The increase of collectivist legislation, which increases the importance of the Legislature, *pari passu* increases also the importance of the Executive, for almost every law delegates to the Executive the power of enacting subsidiary legislation. (iii) In many States, the Executive has acquired quasi-judicial powers. (iv) War necessarily results in an increase in the power of the Executive, and the habit acquired in war-time tends to continue in peace-time as well. (v) Legislatures have everywhere been declining because of the inadequacy of the territorial basis of representation, the methods of election and the party system.

do not induce the best men to enter Parliament ; the electorate, by demanding and acquiring powers of direct legislation, competes with the Legislature, other organizations like the Trade Union Congress and the press are similarly competing with the Legislature for power ; and the Executive's control of the organs of public opinion, particularly the radio, necessarily operates to reduce the importance of the Legislature as a *free* organ for the expression of public opinion (vi) In totalitarian States, the concentration of power in the Executive is part of their very philosophy. (vii) Finally, the nature of modern government is such that leadership continuous and acknowledged, concentrated and co-ordinating, adequately informed and equipped, is vitally necessary

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## CHAPTER XXX

# THE JUDICIARY

### §1 ORGANIZATION OF THE JUDICIARY

'There is no better test of the excellence of a government than the efficiency of its judicial system',<sup>1</sup> for nothing more nearly touches the welfare and security of the citizen than his knowledge that he can rely on the certain, prompt, and impartial administration of justice. The judge, therefore, fulfils an onerous function in the community. His primary duty is to interpret law, to apply the existing law to individual cases, and, by so doing, to hold the scales even both between one private citizen and another, and between private citizens and members of the Government. Incidentally, however, in the process of interpretation, as we have seen, he cannot help making new law,<sup>2</sup> this law-making function being relatively more important in federal States than in unitary States.

The role of the Judiciary being so important, it is obviously essential to choose men of honesty, impartiality, independence and legal knowledge to fill the places of judges. Three methods of appointing them are in vogue, as we have seen: nomination by the Executive,<sup>3</sup> election by the Legislature,<sup>4</sup> and election by the people.<sup>5</sup> There is no doubt that, of the three, the first is the best. A numerous Legislature can hardly be expected to estimate efficiently the legal knowledge required for judicial decisions, and, besides, is likely to be too much influenced by political considerations. For similar reasons, the popular election of judges is also open to objection. Only in three out of the thirty-eight American states where the system prevails has it given any satisfaction.<sup>6</sup>

Regarding the duration of their office, it is now recognized

<sup>1</sup> Bryce, *Modern Democracies*, Vol II, p 421

<sup>2</sup> See above, pp 69-70

<sup>3</sup> In Britain, France, the U S A, Canada, Australia, South Africa, Germany, Italy and India

<sup>4</sup> In Switzerland and the U S S R

<sup>5</sup> In some Swiss cantons and American states

<sup>6</sup> Ogg and Ray, *Introduction to American Government*, pp 779-81

that the preservation of judicial independence requires that judges should hold office for life,<sup>1</sup> independent of the pleasure of the Executive, and that their salaries should not be diminished during their term of office. The extent to which these requirements are met and the methods by which they are met have been discussed elsewhere.<sup>2</sup>

## §2 RELATION TO LEGISLATURE AND EXECUTIVE

### *Relation to the Legislature*

What should be the relation of the Judiciary to the other departments of Government? So far as its relation to the Legislature is concerned, three or four principles may be formulated.

(i) The more the Judiciary is separated from party politics, the better. This means that the Legislature must not have the power to elect judges, and, further, it is desirable that no member of the Legislature should be eligible for a judicial office. (ii) The Legislature may be vested with the power of recommending the removal of judges either by the presentation of an address to the Executive as in Britain, or by impeachment as in the U.S.A. This power is necessary as an ultimate safeguard against a judge who abuses his power by receiving presents, for instance. None, not even a judge, can be entrusted with power without some guarantee against its abuse. (iii) The Judiciary in a unitary State (like France) need not have the power to question the validity of laws passed by the Legislature. (iv) In federal States, the power of the Judiciary to declare unconstitutional a law passed by the Legislatures is essential in order to maintain the supremacy of the constitution. Our survey shows that the Judiciary in the U.S.A. and Australia is vested with ample powers of this kind, but we find that in Canada and Switzerland the Judiciary has considerably reduced powers.

### *Relation to the Executive*

In organizing the relation between the Judiciary and the Executive, the most important principle clearly is that there must be a separation between the two. The separation is desirable because, as far as possible, no member of the Executive

<sup>1</sup> This is sometimes expressed as 'holding office "during good behaviour"', i.e. so long as they are not guilty of any crime known to the law.

<sup>2</sup> See above, p. 86, and part II, bk. II.

### §3] EXECUTIVE AND JUDICIARY IN INDIA

should have judicial functions (subject to the exceptions we have noted in connexion with administrative law in Britain<sup>1</sup>); and because, while it may have the power of appointing judges, the Executive must not have the power of dismissing them. The reason for the second restriction has been explained above. The reason for the first is that such a combination involves damage to both liberty and efficiency. To liberty, because if the two are not separated, the Executive, as judge, has to sit in judgement over its own conduct, which is obviously injurious to freedom; to efficiency, because its members are not chosen for their capacity or training as judges.

But the Executive may be vested with two powers in relation to the Judiciary. The first is the appointment of judges. The appointment of judges by the Executive also has defects; but alternative methods, such as popular election and election by the Legislature, are worse. The only ultimate guarantee that the best men are chosen as judges lies in a convention, supported by professional opinion, that judges must not be chosen for political or party reasons. The Executive's second power in connexion with the Judiciary is the power of pardon.

In its turn, the Judiciary may be vested with the power to review the acts of the Executive. The government officer must be answerable in a court of law for his conduct as a government servant. This is an important safeguard of liberty. It has been noticed in the discussion of modern constitutions<sup>2</sup> that, in general, States on the continent of Europe have established separate administrative courts for the trial of cases in which the Government or its servants are parties. The relative merits and defects of 'the rule of law' and 'administrative law' have also been examined in the same context.

### §3 EXECUTIVE AND JUDICIARY IN INDIA

We have pointed out earlier that in India a number of executive officials are transferred to the judicial department, and vice versa. For example, members of the revenue staff are chosen as sub-magistrates, and sub-magistrates rejoin the revenue staff as deputy collectors. Similarly a number of executive officials perform judicial functions. collectors, who are also district magis-

<sup>1</sup> See above, ch. XVI, §13.

<sup>2</sup> See above, ch. XVI, §13 and XVII, §6.



trates ; revenue divisional officers, who are also subdivisonal magistrates ; and deputy tahsildars who are also sub-magistrates. The district magistrate tries very few cases ,<sup>1</sup> but he exercises administrative control over the sub-magistrates who try the bulk of the criminal cases in the district. These magistrates have to send to the district magistrate regular statements showing the nature of the cases they have tried, the alleged offences and the results of trials, as well as copies of their judgements. The admonitions of the district magistrate regarding delays or errors in the conduct of cases or the award of punishments are communicated to sub-magistrates subsequent to the disposal of the cases, with the intention of regulating their disposal of future cases. A district magistrate may also issue general circulars to all magistrates under his control for their instruction or guidance in dealing with cases.

The problem of the separation of executive and judicial powers thus centres in collectors, divisional officers, deputy tahsildars, and sub-magistrates.

That a man who is trying a criminal should try him in a purely judicial spirit and not be influenced by anxiety regarding promotion or prospects is admitted on all hands. This principle was indeed accepted by Sir Harvey Adamson (Home Member to the Government of India) in the Imperial Legislative Council in 1908.

‘ The exercise of executive control over the subordinate magistrate by whom the great bulk of criminal cases are tried is the point where the present system is defective. If the control is exercised by the officer who is responsible for the peace of the district there is the constant danger that the subordinate magistracy may be unconsciously guided by other than purely judicial considerations.’

It must be remembered too that the promotion and prospects of subordinate magistrates depend partly on the recommendation of the district magistrate collector, it is therefore likely that they will subordinate their own views to what they assume to be his views.

There are disadvantages<sup>2</sup> too in members of the Indian Civil Service being shifted from executive work to judicial work,

<sup>1</sup> In Madras in 1926 he tried on the average one case and heard eight appeals.

<sup>2</sup> It must be admitted that the system has its advantages also.

because a district judge, for instance, trained in the executive field during his earlier years, may not possess those legal attainments or the judicial frame of mind necessary for an impartial administration of justice

Progressive opinion in India, therefore, is in favour of effecting a separation of the Executive from the Judiciary. It demands that the control of the subordinate magistracy should be transferred to some authority independent of the district magistrate collector either to the district and sessions judge or to some officer appointed as his assistant for the purpose. Further, there should be separate officers to discharge the functions of divisional officers and deputy tahsildars, on the one hand, and of first-class and second-class magistrates on the other. Sub-magistrates should be recruited from the bar and placed under the control of the High Court in the same way that district munsiffs are.

Official opinion in India, however, still seems to fight shy of adopting these or similar proposals in the direction of separation.<sup>1</sup> Apart from the additional expenditure which any scheme of bifurcation necessarily involves, it is pointed out that the existing system secures administrative efficiency. At present magistrates subordinate to the district magistrate have the duty of taking preventive measures and quelling disturbances of the public peace, there is a side of magisterial work which must be regarded as preventive rather than punitive. The argument is that in India the head of the district has to deal with rebellions and local outbreaks, in which case he must be able to count on the support of the subordinate magistrates. For this purpose it is very desirable that he should be the chief magistrate of the district and that he should know his men. This advantage is now secured by the fact that sub-magistrates are chosen from revenue officials and are controlled by the collector who is also district magistrate. Further, any real scheme of separation will disintegrate the whole system of district administration, which has been built up as an organic whole, both the revenue and magisterial departments being controlled by the district collector and magistrate. To transfer the magisterial powers of the collector to the district judge, or to another officer, will, it is

<sup>1</sup> The Government of Sind has a scheme for the separation of the Executive from the Judiciary which (according to a Karachi message in *The Hindu* on 30 Nov. 1943) will be brought into operation in 1944

feared, gravely lower his prestige and his value in the scheme of district administration, and lessen the opportunities available for the collector and the sub-divisional officers for keeping personal touch with the people in the district.

In conclusion, it is only necessary to remind the 'routine mind' of the dictum laid down by de Tocqueville that what we call necessary institutions are no more than institutions to which we are accustomed, and that the possibilities of experiment in the social constitution are far greater than most of us imagine.

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